Supreme Court, U.S.
FILED

No. ——

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In The Supreme Court of the United States

MEMBERS OF THE PEANUT QUOTA HOLDERS ASSOCIATION, INC., AUGUSTUS GARRETT, JEROME PAULK, FAYE PAULK, and D.U. PULLUM,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

(1) Whether a compensable taking occurs when the United States transforms a lease agreement, arrived at by arms-length bargaining between private parties and without government intrusion, into a forced sale of the leased property without compensation to the lessor for the property interest lost in the forced sale.

(2) Whether a compensable taking occurs when the United States takes the property interest in a statutory subsidy from its holder and transfers that property interest to a former lessee contrary to statutory assurances that a lease would not adversely affect the property holder's interest.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 1

The Facts 1

Proceedings Below 6

REASON FOR GRANTING THE PETITION 7

QUESTION 1 8

QUESTION 2 15

CONCLUSION 20

APPENDIX A
(Opinion of the United States Court of Appeals for the Federal Circuit)

APPENDIX B
(Order of the United States Court of Appeals for the Federal Circuit Denying Rehearing En Banc)

APPENDIX C
(Appellee's Opposition to Appellants' Petition for Rehearing *En Banc*)

APPENDIX D
(Opinion of the United States Court of Federal Claims)

TABLE OF AUTHORITIES

Page(s)

Cases

Concrete Pipe & Products, Inc. v. Constr. Laborers Pension Trust Fund, 508 U.S. 602 (1993) 10

Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211 (1969) 10

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) ..... *passim*

Kelo v. City of New London, ___U.S. ___, 125 S. Ct. 2655 (June 23, 2005) 7, 15, 16, 18

Members of the Peanut Quota Holders Ass'n v. United States, 60 Fed. Cl. 524 (2004) 1, 6, 12

Members of the Peanut Quota Holders Ass'n v. United States, 421 F.3d 1323 (Fed. Cir. 2005) 1, 7, 12, 17

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) 10

Statutes

7 U.S.C. § 1357-1359a 4

7 U.S.C. § 1358a(c) 6, 11

7 U.S.C. § 1358a(f) 6, 11, 12

7 U.S.C. § 7952 19

28 U.S.C. § 1254(1) 1

OPINIONS BELOW

The opinion of the United States Court of Federal Claims is reported at *Members of the Peanut Quota Holders Ass'n v. United States*, 60 Fed. Cl. 524 (2004). The opinion of the Court of Appeals for the Federal Circuit is reported at *Members of the Peanut Quota Holders Ass'n v. United States*, 421 F.3d 1323 (Fed. Cir. 2005). The order denying rehearing en banc is reported at 2005 U.S. App. LEXIS 29260 (Fed. Cir. 2005).

JURISDICTION

The final judgment of the United States Court of Appeals for the Federal Circuit was entered on December 23, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in relevant part: "Nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

The Facts

Petitioners Augustus Garrett, Jerome Paulk, Faye Paulk, and D.U. Pullum (the "Members") are individual members of the Peanut Quota Holders Association, Inc. The Members owned peanut farms. Pursuant to various statutes, the United States

Department of Agriculture ("USDA") had allocated acreage and then poundage allotments for peanuts ("peanut quotas") to those farms. The Members had, in turn, lawfully negotiated leases for their quotas to non-Member farmers. The Members had periodically leased their quotas since at least 1998, in reliance on express statutory assurances that such leases would not disadvantage the Members or others similarly situated. (Public policy encouraged periodic leasing for growing efficiency and crop rotation purposes.)

The effect of USDA's peanut quotas was to create an artificial minimum price for a quota holder's expected peanut crop. The Members and other quota holders were entitled to "borrow" money from the USDA in advance of the quota holders' sale of mature peanut crops, at a loan rate set at a price per bushel of peanuts. If, upon maturation of the crop, the quota holder was able to sell his crop at a higher price per bushel, the quota holder was required to repay the loan in full. If the quota holder sold the peanut crop for less than the total loan, the USDA did not require the quota holder to repay the loan in full, but instead forgave the unpaid portion of the loan. The purpose and effect of the quota system is to assure holders of quotas a minimum price for the peanuts covered by the quota regardless of market factors.

Over the last six decades, Congress has regulated overall peanut production largely through quotas set by the USDA. Although the peanut quotas originated in the Agricultural Adjustment Act of 1938 ("AAA"), as amended, ch. 39, tit. III, §§ 357-359, 55 Stat. 88, 88-91 (referred to in the panel opinion as the

"1941 Act"), Congress often has changed the formula used to determine quotas.

In 1949, Congress, pursuant to the Agricultural Act of 1949, ch. 792, tit. I, § 101, 63 Stat. 1051-52, amended the AAA, instituting a price support program for various crops, including peanuts, as well as increasing loan rates overall.

In 1967, Congress again amended the AAA, *expressly permitting peanut farm owners and operators "to sell or lease all or any part of the right to all or any part of their peanut acreage allotment".* Pub. L. No. 90-211, § 358a, 81 Stat. 658.

In 1996, Congress enacted the Federal Agriculture Improvement and Reform Act of 1996 (the "1996 FAIR Act"), Pub. L. No. 104-127, § 155, 110 Stat. 888, 922-30. The 1996 FAIR Act utilized marketing assistance loans to provide the price support for peanut producers and largely continued the system created in 1967, including the right of quota holders to lease their acreage allotments. § 155(i)(6)(A) of the 1996 FAIR Act.

In addition to continuing to allow quota holders like the Members to lease those valuable properties to non-quota holders, § 155(i)(6)(D) of the 1996 FAIR Act specifically guaranteed that: "[a]ny farm poundage quota transferred under this paragraph shall not result in any reduction in the farm poundage quota for the transferring farm if the transferred quota is produced or considered produced on the receiving farm." In other words, the Members, as bona fide quota holders, could lease their quotas to other

farmers without risking any reduction in their quota allocation.

The Members relied upon and availed themselves of this statutory provision and entered into leases for their quotas with non-Members. Thus, from 1977 until 2002, the Members, as well as all other peanut farmers, were guaranteed by statute that they could either farm their land or lease it for farming and receive exactly the same price support. No peanut farmer was worse off because he or she chose to lease the peanut quota rather than grow peanuts on the farmer's own land.

In 2002, Congress enacted the Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, §§ 1301-1310, 116 Stat. 134, 166-83 (the "2002 Act"), which amended the 1996 FAIR Act and specifically repealed the marketing quota program contained in 7 U.S.C. §§ 1357-1359a. Despite the unbroken statutory promise from 1967 until 2002 that peanut farmers would not be disadvantaged with respect to quotas because they leased the quotas instead of growing the peanuts themselves, the 2002 Act cut off the property right of quota holders like the Members who had leased their land in reliance on unbroken statutory assurances that leases would not diminish their property right and transferred the property interest in a peanut subsidy to the former lessees. Thus, the Members and all other farmers who leased their peanut quota lost their property rights in their quotas solely because they availed themselves of the statutory protection and leased their quotas rather than farmed their own land. Congress provided an involuntary "buyout" for former quota holders, but at a

price which the Members alleged did not constitute fair market value for the quotas.

The effect of the 2002 Act upon the Members was the following: (1) Because they had previously leased their quotas to other peanut farmers, they lost their property right to a government subsidy. (2) The lessees to whom the Members leased their quotas obtained the property right to the subsidy that the Members previously enjoyed. Under the 2002 Act, the property right was framed as a right to price supports for eligible peanuts, but the economic effect and benefit to peanut farmers was the same as a quota: *i.e.*, the federal government guaranteed a minimum price for certain peanuts that was extremely valuable.[1]

The 2002 statute not only cut off price supports for the Members because they had leased their property and transferred the right to receive a subsidy to the former lessees of the property, but it also permitted the former lessees to contract with third parties to produce peanuts. In short, the former lessees were permitted to "lease" their right to the subsidy without losing their entitlement to the subsidy even though the former lessors were deprived of their quota rights for engaging in precisely the same arrangement. The direct effect of this law was a governmental taking of the quota rights from the owner of those rights and giving the rights to the owner's lessee.

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[1] The price supports involved direct payments and counter-cyclical payments. Together these payments guaranteed a minimum payment for eligible peanuts.

The 1996 FAIR Act was specific and clear in its guarantee that the Members could lease their quotas without penalty. The Act provided as follows:

> Any farm poundage quota transferred under this paragraph shall not result in any reduction in the farm poundage quota for the transferring farm if the transferred quota is produced or considered produced on the receiving farm.

1996 Act, § 155(i)(6)(D). *See also* 7 U.S.C.§ 1358a (c) and (f), discussed below. The 2002 Act turned the tables on the Members and punished them for entering into the leases which were protected by the 1996 Act.

Proceedings Below

The Members filed suit in the United States Court of Federal Claims alleging that the 2002 Act constituted a taking. That court granted summary judgment for the United States on the ground that the Members failed to establish a property interest in their peanut quotas protected by the Takings Clause of the Fifth Amendment. *Members of the Peanut Quota Holders Ass'n v. United States*, 60 Fed. Cl. 524 (2004). On August 25, 2005, a panel of the United States Court of Appeals for the Federal Circuit rejected the Claims Court decision with respect to the Members' property right and found that the Members did indeed possess a property interest in their peanut quotas.

The panel held, however, that because the government created the property interest the government was free to terminate it without paying compensation to the holders of the property interest.

Members of the Peanut Quota Holders Ass'n v. United States, 421 F.3d 1323 (Fed. Cir. 2005). The Members sought rehearing en banc, but it was denied. 2005 U.S. App. LEXIS 29260 (Fed. Cir. 2005).

REASONS FOR GRANTING THE PETITION

(1) The court of appeals' decision conflicts with this Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), because it permits the United States to retroactively transform a lease agreement, arrived at by arms-length bargaining between private parties and without government intrusion, into a forced sale of the leased property without paying just compensation to the lessor.

(2) The court of appeals' decision conflicts with this Court's decision in In *Kelo v. City of New London*, ___U.S. ___, 125 S.Ct. 2655 (June 23, 2005), because it permits the United States to take a property interest from one person and transfer it to another without paying just compensation.

QUESTION 1:

ARGUMENT: THE 2002 ACT CONSTITUTES A TAKING UNDER *EASTERN ENTERPRISES V. APFEL* BECAUSE IT IS GOVERNMENT ACTION THAT RETROACTIVELY TRANSFORMS A CONTRACTUAL LEASE ARRANGEMENT INTO AN INVOLUNTARY SALE WITHOUT PROVIDING JUST COMPENSATION

A compensable taking occurs when the United States acts to transform a lease agreement, arrived at by arms-length bargaining without government intrusion, into a forced sale of a statutory subsidy without compensation for the forced sale despite a statutory assurance that no owner/lessor who leased the subsidy would be disadvantaged as a result of the lease.

Two scenarios serve to illustrate how the 2002 Act transformed contractual leases into involuntary sales and why these involuntary sales violate the Takings Clause. In scenario 1 – after the 1996 Act but prior to the 2002 Act – Farmer A chose to *sell* (and not merely lease) his peanut quota to Farmer B, who grew peanuts and benefited from the quota he had purchased. Farmer A would receive, and Farmer B would pay, the fair market value of the property right associated with the peanut quota (or its equivalent) over the entire estimated life of the property right. In this scenario, Farmer A would have received just compensation for his property, while Farmer B would receive price supports (*i.e.*, the property right) under the terms of the 1996 Act, as well as price supports under the terms of the 2002 Act.

In scenario 2 – after the 1996 Act and again prior to the 2002 Act – Farmer A chose to lease his peanut quota to Farmer B on a year-by-year basis. Farmer B grew peanuts but either: (1) chose not to buy Farmer A's quota; (2) could not afford to do so; or (3) could not persuade Farmer A to sell. Each year, the two farmers would negotiate a price for the lease, which would reflect the fact that it was a year-to-year arrangement, with Farmer A retaining ownership of the underlying property right in the quota or its equivalent.

The 2002 Act immediately transferred Farmer A's property right to price supports to Farmer B, even though Farmer B never paid for the underlying property right and had contracted solely for a lease arrangement. In so doing, the 2002 Act transformed all leases into sales without providing compensation to the lessors, who likewise were transformed into involuntary sellers. This dramatic shift in the relationship of lessor and lessee is not the result of arms-length bargaining between private parties. It is quite the opposite. The 2002 Act ignores the contract actually struck by the farmers and turns a lease into a sale by congressional fiat. This result constitutes a taking under *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998).

Writing for the plurality in *Eastern Enterprises*, Justice O'Connor observed that:

> Our opinions in *Turner Elkhorn*,[5] *Connolly*,[6] and *Concrete Pipe*,[7] make clear that Congress has considerable leeway to fashion economic legislation, including the power to affect contractual commitments between private parties. Congress also may impose retroactive liability to some degree, particularly where it is "confined to short and limited periods required by the practicalities of producing national legislation." *Our decisions, however, have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience.*

524 U.S. at 528-29 (emphasis added; internal citation omitted)

In this case, the 2002 Act imposes a severe "liability" – the sudden and complete loss of price supports – on parties who "not only could not have anticipated the liability," *id.*, but who had relied on specific statutory assurances that they would not

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[5] *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

[6] *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1969).

[7] *Concrete Pipe & Products, Inc. v. Constr. Laborers Pension Trust Fund*, 508 U.S. 602 (1993).

suffer any detriment from leasing their peanut quotas. Furthermore, the loss of the price supports is "substantially disproportionate" to the historical experience of the parties. *Id.*

As the complaint in this case indicates, plaintiffs Faye and Jerome Paulk farmed their land from the time they were married in 1968 until the enactment of the 2002 Act, with two exceptions. They were unable to farm because of injury in 1977, and they decided to lease their peanut quota to tenants during 1998, 2000, and 2001. JA at 2234. As Mrs. Paulk explained in the affidavit accompanying the complaint, had she and her husband not relied on the fact that leasing was permitted without penalty, they would have employed laborers to work their own land. JA at 2236. Had they done so, they would retain their right to the government subsidy that continues under the 2002 Act.

Another plaintiff, Augustus Garrett, was 69-years-old when the complaint was filed, and the farm land with his peanut quota has been in his family for his entire life. He relied on the government's statutory assurance that leasing his quota would not deprive him or diminish his property interest.

The economic reality is that the plaintiff Members and all those similarly situated could have served as general contractors and subcontracted the harvesting of their peanut crop had they any idea that, by leasing, they would lose their peanut price supports. They relied upon the specific assurances of 7 U.S.C. § 1358a (c) and (f). Subdivision (c) provided: "[t]hat in the case of a transfer of the lease the amount

of the allotment *shall be considered*, for the purpose of determining allotments after the expiration of the lease, to have been planted on the farm from which such allotment is transferred." (Emphasis added). Subdivision (f) provided:

> The lease of any part of a peanut acreage allotment determined for a farm *shall not affect the allotment* for the farm from which such allotment is transferred or the farm to which it is transferred, except with respect for the crop year or years specified in the lease. *The amount of the acreage allotment which is leased from a farm shall be considered for purposes of determining future allotments to have been planted to peanuts on the farm from which such allotment is leased* . . . .

(Emphasis added).

There can be no doubt that the 2002 Act imposed a "substantial" economic burden on the Members. *Eastern Enterprises*, 524 U.S. at 529. It completely deprived them of their price supports and, as the Court of Claims and the panel noted, the price supports are of enormous value to peanut farmers. 60 Fed. Cl., at 526; 421 F.3d at 1328.

There also can be no doubt that the 2002 Act interfered with the investment backed expectations of the Members. *Eastern Enterprises*, 524 U.S. at 532. The Members owned their land and their quotas. They had the choice of selling them, leasing them, or farming them. The statutory scheme clearly stated that, if they chose to lease the property that had been

allotted to them, the result of that economic decision would be to put them in the same position as if they had farmed themselves. The decision to lease was an economic judgment as to how best to use property. The decision relied upon a clear statutory protection.

The effect of the 2002 Act is to transform the 2002 lease retroactively into a sale of the peanut price supports. The plurality clearly stated in *Eastern Enterprises*, 524 U.S. at 532, that "[r]etroactivity is generally disfavored in the law," and there can be no doubt that the 2002 Act retroactively converted one economic transaction, a lease, into another very different transaction, a sale, without the consent of all parties to the transaction.

There also can be no doubt that, as in *Eastern Enterprises*, 524 U.S. at 537, "the nature of the governmental action in this case is quite unusual." In *Eastern Enterprises*, *id.*, the plurality noted that the statute "singles out certain employers to bear a burden that is substantial in amount." In the instant case, the 2002 Act singles out certain property owners to bear a burden that is substantial in amount and punishes them for relying on a long-standing statutory assurance that they would suffer no adverse consequences from leasing their property interest.

In sum, everything the plurality determined to constitute a taking found in *Eastern Enterprises* is present in this case and more. Congress's decision to retroactively punish the Members for leasing their property interest is highly unusual given the previous statutory guarantees that leasing not only was

permissible but also would result in no diminishment of the lessor's property interest.

Justice Kennedy, who concurred in part and dissented in part in *Eastern Enterprises*, almost certainly would have found a taking in this case. He declined to join the plurality in *Eastern Enterprises* because "[t]he Coal Act does not appropriate, transfer, or encumber an estate in land (*e.g.*, a lien on a particular piece of property), a valuable interest in an intangible (*e.g.*, intellectual property), or even a bank account or accrued interest." 524 U.S., at 540. Justice Kennedy wrote that "the Government's imposition of an obligation between private parties, or destruction of an existing obligation, must relate to a specific property interest to implicate the Takings Clause." *Id.*, at 544. It is clear that the 2002 Act both appropriates and transfers a specific property interest.

Thus, petitioners ask this Court to find that they were deprived of a compensable property interest by the 2002 Act and are entitled to just compensation under the reasoning of *Eastern Enterprises*.

QUESTION 2:

ARGUMENT: THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S DECISION IN *KELO V. CITY OF NEW LONDON* BECAUSE IT PERMITS THE GOVERNMENT TO TAKE A PROPERTY INTEREST FROM ONE PERSON AND TRANSFER IT TO ANOTHER WITHOUT PAYING JUST COMPENSATION

The court of appeals recognized that the Members *had* a property interest in their peanut quotas. It also recognized that the Members were permitted by statute to lease their property interest, and guaranteed by statute they would suffer no adverse consequences if they chose to enter into a lease arrangement. The 2002 Act took away the Members' property interest and gave it to the former lessees. This is a taking.

In *Kelo v. City of New London*, ___U.S. ___, 125 S.Ct. 2655 (June 23, 2005), the Court reviewed a development plan adopted by the City of New London in 2000 that had been touted to create new jobs, increase tax and other revenues, and revitalize an economically distressed city. To assemble the land needed for this project, the city had purchased parcels of property from willing sellers and had planned to use its eminent domain power to acquire other parcels of property from unwilling owners. Although the city also had planned to offer just compensation to the unwilling owners, those owners claimed that the involuntary transfer of property did not amount to a taking for a "public use" and thus violated the Fifth Amendment.

Justice Stevens' majority opinion began its legal analysis with the following clear statement:

> Two polar propositions are perfectly clear. On the one hand, it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future "use by the public" is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example.

125 S. Ct. at 2661.

Although "[n]either of these propositions . . . determine[d] the disposition" of that case, *id.*, the Court's first proposition definitely controls this one. The United States may not take the property of A (the Members) for the sole purpose of transferring it to another private party B (the lessees), even if the United States is prepared to pay just compensation. The Members' complaint is that the United States has in fact taken their property, the peanut quotas, and transferred it to their competitors, which violates the Takings Clause, and that the United States compounded that constitutional violation by failing to pay just compensation to the Members, which constitutes a separate violation of the Takings Clause. Given the fact that the government specifically assured property owners for 35 years that they would not be adversely affected by leasing their property interest, no public interest in taking away the

Members' property and giving it, without compensation, to their former lessees could conceivably be asserted.

The Court of Appeals rejected the Members' complaint, reasoning as follows:

> The question . . . is not whether the peanut quotas have aspects of property, but whether Congress must pay the owners of peanut quotas compensation when it takes steps that render the quotas less valuable, or even valueless. The answer is no, because the property interest represented by the peanut quota is entirely the product of a government program unilaterally extending benefits to the quota holders, and nothing in the terms of the statute indicated that the benefits could not be altered or extinguished at the government's election.
>
> By analogy, undoubtedly food stamps in the hands of food stamp recipients are property. Theft or fraud that deprived the owner of food stamps would surely be punishable as theft or fraud directed at property. But, *the government's decision to terminate the food stamp program before the food stamps could be issued* would not give rise to an obligation to compensate prospective holders of the stamps.

421 F.3d at 1324 (emphasis added).

Although the Court of Appeals' reasoning might be sound in general, its holding in this case was clearly in error as it is based on two incorrect assumptions, first that the United States was "terminating" peanut price supports and, second, that the United States was doing so "before the . . . program" had distributed property to the Members. *Id.* In fact, the 2002 Act retains a subsidy for some peanut growers, but it transfers the subsidy in the form of price supports from some farmers, including the Members, to others. The Act takes away property from the Members because they relied on a statutory assurance that they could lease their property without penalty and transfers the property interest to former lessees who paid for a lease not for the underlying property interest.

The question, therefore, is not whether Congress may eliminate a government subsidy or welfare program generally; it is whether the government may take a property right from one holder and convey it to another in an ongoing program. The subsidy program is ongoing. The right to a peanut subsidy remains, although the word "quota" is no longer the description given to the price supports.

The Court of Appeals did not address this question, and the conflict between the reasoning of the Court of Appeals and that of this Court in *Kelo* warrants review. As Justice Kennedy's separate opinion in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 544 (1998), noted, "the Government ought not to have the capacity to give itself immunity from a takings claim by the device of requiring the transfer of property from one private owner directly to another."

In its Opposition to Appellants' Petition for Rehearing *En Banc* (Appendix C), the government argued that there was no transfer of property rights from the Members to their lessees. This argument relies on form over substance. The 2002 Act continues to offer peanut growers certain subsidies, which are as much property rights as the peanut quotas were under earlier legislation.

Moreover, the government concedes, Appendix C at 6, that the subsidy provided in the 2002 Act is tied to the previous production of peanuts. The 2002 Act establishes a subsidy by determining a "base" in pounds of peanuts that reflects production history. 7 U.S.C. § 7952. The effect of the 2002 Act is to take the "base" previously owned by the Members and transfer it to the former lessees. The government does not contest that the 2002 Act transfers to the former lessees the Members' production history allocated to them under the 1996 statute. Without a production history, there is no property right; with a production history one exists. The Members owned their production history until the 2002 Act took it away and gave it to former lessees. This is a taking under any reasonable view of what the 2002 Act actually accomplished.

Unable to argue that the 2002 Act does not take away from the Members the subsidy derived from their production history and give that subsidy to former lessees, the government argues instead that there has been no transfer of the Members' quotas, because "[t]here are no quotas". Appendix C at 7. The word "quota" is no longer used to define the property interest in the 2002 Act, but the subsidies in the 2002

Act flow directly from the production history and credits in the 1996 FAIR Act and previous statutes. Renaming the subsidy program and redefining the conditions for receipt of the subsidy cannot disguise the fact that property interests previously held by lessors have been transferred without compensation by the 2002 Act to former lessees.

Just compensation is particularly appropriate in this case because there is no question that, had the Members hired the lessees to do the farming on the Members' land, the Members would retain their right to a continuing subsidy under the 2002 Act. The only reason the Members engaged in a lease arrangement rather than a subcontracting one is that the 1996 FAIR Act, like its predecessors, provided statutory assurance that peanut growers who leased their property interest would be no worse off than those who subcontracted their interest. The 2002 Act deprived the Members of their reasonable reliance on the statute and took their property without providing the just compensation to which they are entitled. As a matter of policy, it is interesting to note that the entire controversy presented by the governmental taking in this action would have been avoided by prospective, as opposed to retroactive, application of the 2002 Act.

CONCLUSION

For the reasons stated, petitioners respectfully request that this Honorable Court grant the petition for a writ of certiorari to the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,
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United States Court of Appeals
for the Federal Circuit

04-5099

MEMBERS OF THE PEANUT QUOTA HOLDERS ASSOCIATION, INC., AUGUSTUS GARRETT, JEROME PAULK, FAYE PAULK, and D. U. PULLUM,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

[ENTERED: August 25, 2005]

David Wm. Boone, Boone & Stone, of Atlanta, Georgia, argued for plaintiff-appellants.

Jane W. Vanneman, Senior Trial Counsel, Commercial Litigation Branch, United States Department of Justice, of Washington, DC, argued for defendant-appellee. With her on the brief were Peter P. Keisler, Assistant Attorney General and David M. Cohen, Director.

Appealed from: United States Court of Federal Claims

Judge Christine O.C. Miller

United States Court of Appeals
for the Federal Circuit

04-5099

MEMBERS OF THE PEANUT QUOTA HOLDERS ASSOCIATION, INC., AUGUSTUS GARRETT, JEROME PAULK, FAYE PAULK, and D. U. PULLUM,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

DECIDED: August 25, 2005

Before LOURIE, BRYSON, and GAJARSA, Circuit Judges.

GAJARSA, Circuit Judge.

Augustus Garrett, Jerome Paulk, Faye Paulk, and D.U. Pullum (collectively "the Members") are individual members of the Peanut Quota Holders Association, Inc. The Members individually appeal the final decision of the United States Court of Federal Claims (the "trial court") awarding summary judgment to the United States ("the government") on the ground that the Members possessed no compensable property interest in the peanut quota allocated to them under the Federal Agriculture

Improvement and Reform Act of 1996, Pub. L. No. 104-127, § 155, 110 Stat. 888, 922-30 (the "1996 FAIR Act"). Members of the Peanut Quota Holders Ass'n v. United States, 60 Fed. Cl. 524 (2004) ("Peanut Quota Holders Ass'n").

The Members are all individuals who owned farms to which peanut quotas had been allocated under the former statutory provisions and who had leased their quotas to other farmers since at least 1998. The peanut quotas allowed the Members to obtain favorable loan rates[1] for their peanut crop. The loan rates effectively maintained an artificial minimum price for a quota holder's peanut crop. Under the former statutory provisions, the loan rates could also be sold or leased.[2]

The statute granting the peanut quotas was amended in 2002. Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, §§ 1301-1310, 116 Stat 134, 166-83 (the "2002 Act"). The 2002 Act made peanut quotas available only to those who actually farm peanuts and thereby share

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[1] A loan rate is defined as "[t]he price per unit (bushel, bale, pound, or hundredweight, depending on the commodity) at which the government will provide non-recourse loans to farmers (or associations acting on their behalf). This short term financing at below market interest rates enables farmers to hold their commodities for later sale." Agricultural Dictionary, available at http://www.nasda.org/joint/farmbill/dictionary.html (last visited July 13, 2005).

[2] By leasing a peanut quota allotment a peanut quota holder could retain the peanut quota for use in future years while allowing another farmer to produce peanuts at the quota loan rate.

in the risk of production. Since the Members had leased their quotas, they were not eligible to receive a peanut quota under the new statutory provisions. The Members claim that the loss of price support for the 2002 crop and their loss of eligibility for future peanut quotas have led to financial losses. The gravamen of their complaint is that the new statute effectuated a regulatory taking of the loan rate they would have received in 2002 as well as their eligibility to obtain future peanut quotas.

Upon review, we conclude that the trial court erred in determining that the statutory created peanut quota is not a property interest. Nonetheless, we agree with the trial court that this property right is not compensable under the Fifth Amendment. Consequently, the judgment of the trial court is affirmed.

BACKGROUND

A. The History of the Peanut Quota

In order to assess whether the Members have a property interest in the peanut quota, it is necessary to understand the statutory evolution of the peanut quota program. In the 1930s the United States' economic depression particularly affected the agricultural community. Congress, in an attempt to mitigate the effects of the depression on agricultural products, enacted the Agricultural Adjustment Act of 1938 ("AAA"), ch. 30 tit. III, § 301 et seq., 52 Stat 31, 38, which regulated the production and sale of tobacco and wheat within the United States. The statute instituted acreage allotments to prevent

oversupply of the targeted agricultural commodities. In 1941, the AAA was amended to include farm acreage allotments for peanuts. The Agricultural Adjustment Act of 1938, as amended, ch. 39, tit. III, §§ 357-359, 55 Stat. 88, 88-91 (the "1941 Act"). The 1941 Act sought to regulate the production of peanuts to avoid severe fluctuations in price caused by rapid changes in market demand and the year-long lag in response to that demand caused by crop growing cycles. 1941 Act, 55 Stat. at 88. Since 1941, Congress has regulated peanut production primarily through quotas set by the Secretary of Agriculture ("Secretary"), but the nature and reach of the quota system has not remained constant.

Under the 1941 Act, the Secretary was required to proclaim annually the total quantity of peanuts that would be made available for marketing the following year; this was known as the "national marketing quota." This quota was to be equal to the average amount of peanuts harvested during the five years prior to the year of the proclamation, adjusted for trends in production and prospective demand. To apportion the national marketing quota among the producing peanut farms, it was converted to a national acreage allotment. This allotment was derived by dividing the national marketing quota by the normal yield per acre.[3]

The national acreage allotment was divided proportionally among states based on the average

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[3] The normal yield per acre was set at the five-year average of the national average yield per acre derived from the years preceding the proclamation year.

relative peanut production per state for the five years immediately preceding the proclamation year, adjusted for trends in yields and abnormal conditions of production. Each state acreage allotment was subsequently apportioned among farms in that state. The farms that obtained allotments were farms on which peanuts were grown in any of the three years immediately preceding the year for which the allotment was determined. The state allotments were apportioned on the basis of the tillable acreage available for the production of peanuts and the past acreage of peanuts grown on the farm. The actual amount of peanuts produced on the acreage allotment equaled the marketing quota for the farm. 1941 Act, 55 Stat. at 89-90.

A farmer with an allotment was subject to financial penalties[4] if he marketed peanuts in excess of his farm's marketing quota. Any farmer who grew peanuts without an allotment was also subject to financial penalties.[5]

Under the 1941 Act, the Secretary of Agriculture was directed to make loans available to farmers with marketing quotas for peanuts. The Secretary of Agriculture provided the loans through the Commodity Credit Corporation ("CCC"). The CCC offered loans to farmers at rates between fifty

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[4] The penalty was three cents per pound, unless the peanuts were falsely identified or unreported, in which case a fine of twenty-five dollars per acre, or fraction thereof, was imposed.

[5] The penalties for growing peanuts without any allotment were the same as those for exceeding an allotment.

and seventy-five percent of the parity price[6] of peanuts. 1941 Act, 55 Stat. at 91. These loans provided farmers with operating capital. The loans were non-recourse, such that if the farmer was unable to sell his crop at a profit and repay the loan with interest before it matured, the CCC accepted the actual peanut crop sales revenue as full repayment of the loan.

The Agricultural Act of 1949, ch. 792, tit. I, § 101, 63 Stat. 1051-52 (the "1949 Act"), instituted the price support program. The 1949 Act increased loan rates overall. It also tied the loan rates into an inverse relationship with the amount of overproduction of peanuts for the year.

The AAA was amended again in 1967 to allow peanut farm owners and operators "to sell or lease all or any part of the right to all or any part of their peanut acreage allotment." Pub. L. No. 90-211, § 358a, 81 Stat. 658 (the "1967 Act"). The 1967 Act also permitted an owner of a farm with an acreage allotment to transfer the allotment to his other farms. Transfers were restricted such that they were only permitted between farms within the county in which the peanut acreage allotment was

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[6] The parity price is defined as "[a] measurement of the purchasing power of a unit of a particular commodity." Agricultural Dictionary, available at http://www.nasda.org/joint/farmbill/dictionary.html (last visited July 13, 2005).

The 1941 Act set the parity price "on the basis of the formula used in determining the parity price of peanuts as published by the Bureau of Agricultural Economics in The Agricultural Situation, volume 25, number 1, January 1941." 1941 Act, 55 Stat. at 91.

apportioned. Other restrictions further limited the transferability of the allotments.

By 1977, the introduction of new seed varieties, new fertilizers, and new farm management techniques had substantially increased the yield of peanuts per acre. As a result, there was an oversupply of peanuts. These conditions prompted Congress to revamp the peanut program in the Food and Agriculture Act of 1977, Pub. L. No. 95-113, §§ 801-807, 91 Stat. 913, 944-49 (the "1977 Act"). The 1977 Act temporarily suspended much of the AAA and its subsequent amendments and, in its place, instituted poundage quotas based on the weight of peanuts produced by the quota holders. The new poundage quotas applied only to peanuts destined for domestic edible use.[7] The poundage quota system was used in conjunction with the acreage allotment system; a poundage quota was established for each farm that possessed an acreage allotment under the AAA.

The 1977 Act also amended the price support program to provide different support levels for "quota peanuts" and "additional peanuts." Quota peanuts were any peanuts that were eligible for domestic edible use and that did not exceed the poundage quota of the farm. Additional peanuts were any peanuts that were in excess of a farm's poundage quota but not in excess of the actual production of the acreage allotment. This

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[7] "Domestic edible use" referred to all food uses for peanuts and, at this juncture, included peanuts used for seed. 1977 Act, 91 Stat. at 946.

differentiation continued to discourage overproduction because the price support provided for additional peanuts was substantially lower than that provided for quota peanuts.[8]

In 1981, Congress passed yet another law that temporarily suspended the AAA. The Agriculture and Food Act of 1981, Pub. L. No. 97-98, §§ 701-707, 95 Stat. 1213, 1248-56 (the "1981 Act"). The 1981 Act terminated acreage allocations and marked the end of a four year transition to the poundage quota system that began with the 1977 Act. The 1981 Act retained the two-tiered system (of quota peanuts and additional peanuts) based on poundage. It also enlarged the definition of additional peanuts to include any peanuts that were not covered by a poundage quota, irrespective of whether the peanuts were grown by a farm that possessed a poundage quota. Thus, under the 1981 Act, the peanut quota no longer restricted the production of peanuts. Poundage quota holders simply received more generous support from the government than non-quota holders.

In 1996, to mitigate the ever increasing costs to the public of maintaining the price support programs, Congress enacted the 1996 FAIR Act. The 1996 FAIR Act, like the 1977, 1981, 1985, and 1990 Acts before it, suspended most provisions of the AAA. The 1996 FAIR Act, in large part, continued the system created in 1977 with minor modifications.

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[8] The level of support for additional peanuts was calculated by taking into consideration the demand for peanut oil and peanut meal, expected prices of other vegetable oils and protein meal, and demand for peanuts in foreign markets.

The price support for peanut producers under the 1996 FAIR Act took the form of marketing assistance loans. The U.S. Department of Agriculture ("USDA") set loan rates and extended these loans to marketing associations, which, in turn, made loans to peanut producers. The loans were again represented by non-recourse notes, such that if the revenue from the sale of the peanuts did not cover the full amount of the loan, the marketing association and, by default, the USDA made up the difference. If the revenue from the sale of the peanut crop covered the loan amount, the producer repaid the loan in full.

The 1996 FAIR Act established marketing loan rates through the 2002 marketing year.[9] The 1996 FAIR Act set the loan rate for quota peanuts at $610.00 per ton. 1996 FAIR Act, § 155(a)(2). By comparison, the loan rate set by the Secretary for non-quota peanuts in 1997 was $132.00 per ton.[10] The loan rate differential, combined with restrictions on importation, gave quota holders a considerable financial advantage in the peanut market by setting a floor on the price they would receive for their crop. The 1996 FAIR Act specifically allowed quota holders to sell or lease their quotas to other producers with a farm in the same state. 1996 FAIR Act, § 155(i)(6)(A). The 1996 Act also amended the

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[9] The marketing year is the twelve-month period, generally from the beginning of a new harvest, over which a crop is marketed. For peanuts it is August 1 to July 31.

[10] By statute, the Secretary is required to set the loan rate at a level estimated to ensure that there are no losses by the CCC on the sale or disposal of the peanuts. 1996 FAIR Act, § 155(b)(2).

AAA to specifically protect transferors from a subsequent reduction of their quotas: "Any farm poundage quota transferred under this paragraph shall not result in any reduction in the farm poundage quota for the transferring farm if the transferred quota is produced or considered produced on the receiving farm." 1996 FAIR Act, §155(i)(6)(D).

In 2002, Congress amended the peanut quota program by repealing the marketing quota program, establishing a "buyout" of quota holders, and creating a new price support program. The buyout provision authorized a one-time payment to quota holders of $0.55 per pound, which equated to a payment of $0.11 per pound for five years. 2002 Act, § 1309(b)(1).

To have been eligible for the new quota, one must have been a "producer on a farm in the United States that produced or was prevented from planting peanuts during any or all of the 1998 through 2001 crop years." 2002 Act, § 1301(5). Thus, the new quota was available to "an owner, operator, landlord, tenant, or sharecropper that shares in the risk of producing a crop on a farm and is entitled to share in the crop available for marketing from the farm." 2002 Act, § 1301(8). This definition of producer marks a distinct departure from the definition used in previous statutes, including the 1996 Act, because it excludes from consideration farmers who leased or transferred their quotas to other producers. 7 C.F.R. § 729.214(m) (2003). Prior to the 2002 Act, farmers were considered producers even if they had leased their quotas and, as a consequence, could have a

quota even if they did not share in the risk of producing a crop.

B. The Proceedings Before the Court of Federal Claims

The trial court determined that the primary issue before it was whether the 1996 FAIR Act created a property interest vested in a peanut quota holder that was eliminated by the 2002 Act. The Members asserted a regulatory taking of their alleged property right in the peanut quota created by the 1996 FAIR Act.[11] They argued (1) that the 2002 Act rendered valueless expenditures made in reliance on their peanut quotas for the 2002 growing season; (2) that by establishing a program of marketing loans open to peanut producers who actually grew peanuts, the statutory changes deprived them of their entitlement to price supports under the 1996 FAIR Act; and (3) that the "buyout payments" established under the 2002 Act did not approximate the fair market value of the repealed "peanut quota."

The trial court determined that while the Members hold protected property interests in farm land and equipment, those property interests do not extend to the crop marketing quotas established by

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[11] On appeal, the Members attempt to assert a categorical taking of their "peanut quota" under the Fifth Amendment. Because the Members failed to raise this issue before the trial court, this court cannot entertain it on appeal. Absent extraordinary circumstances, an appellant may not raise a new issue on appeal. Singleton v. Wulff, 428 U.S. 106, 120 (1976).

the 1996 FAIR Act. The trial court reasoned that "[a] citizen does not possess the 'right to exclude' when he voluntarily enters an area subject to government control." Peanut Quota Holders Ass'n, 60 Fed. Cl. at 528. The trial court found support for this conclusion from our holding in Mitchell Arms, Inc. v. United States, 7 F.3d 212, 216 (Fed. Cir. 1993). Relying on Mitchell Arms, the trial court reasoned that the expectation of a poundage quota share was merely a collateral interest incident to the Members' ownership of farm land. Peanut Quota Holders Ass'n, 60 Fed. Cl. at 529. The trial court concluded that "[b]ecause Congress has the right to modify or terminate a federal program, the benefits of such a program do not constitute a property interest protected by the Fifth Amendment." Id. Accordingly, the trial court awarded summary judgment in favor of the government. The Members appeal the trial court's decision.

We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

A. Standard of Review

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Fed. Cl. R. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). We review a grant of summary judgment de novo to determine whether the trial court correctly applied this standard. See

Cienega Gardens v. United States, 265 F.3d 1237, 1244 (Fed. Cir. 2001).

Whether a compensable taking has occurred is a question of law based on factual underpinnings. Wyatt v. United States, 271 F.3d 1090, 1096 (Fed. Cir. 2001). To evaluate whether a governmental action effects a taking of private property without just compensation, this court must first determine whether the claimant has established a property interest for purposes of the Fifth Amendment. Conti v. United States, 291 F.3d 1334, 1339 (Fed. Cir. 2002). Once a property right has been established, the court must then determine whether a part or a whole of that interest has been appropriated by the government for the benefit of the public. Id. While a taking often occurs as a result of a physical invasion or confiscation, the Supreme Court has long recognized that "if a regulation goes too far it will be recognized as a taking," Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). The issue in this case is whether, in amending the statute that created the peanut quota, the government effected a compensable taking of a property interest under the Fifth Amendment.

B. Definition of a Property Right

The Fifth Amendment provides that private property shall not be taken for public use without just compensation. U.S. Const. amend. V, cl. 4. The purpose of the Fifth Amendment, as delineated in the cases interpreting it, is to prohibit the "Government from forcing some people alone to bear public burdens which, in all fairness and justice,

should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960).

"The Constitution neither creates nor defines the scope of property interests compensable under the Fifth Amendment." Conti, 291 F.3d at 1340 (citing Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972)). The parameters of a protected property interest are delimited by the law that creates the interest, see Roth, 408 U.S. at 577-78, and by "existing rules and understandings" and "background principles" derived from independent sources, such as state, federal, or common law, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992); Maritrans Inc. v. United States, 342 F.3d 1344, 1352 (Fed. Cir. 2003). These "background principles" and "rules and understandings" focus on the nature of the citizen's relationship to the alleged property, such as whether the citizen had the rights to exclude, use, transfer, or dispose of the property. See United States v. Gen. Motors, 323 U.S. 373, 378 (1945). To have a property interest in a benefit, "a person . . . must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Roth, 408 U.S. at 577.

On the basis of these principles, the Supreme Court and this circuit have evaluated various regulatory schemes to determine whether intangible property such as government issued permits and licenses give rise to property interests protected by the Fifth Amendment. Specifically, the Supreme Court has found that express statutory language can

prevent the formation of a protectable property interest. See United States v. Fuller, 409 U.S. 488, 494 (1973). In the absence of express statutory language, this court has looked to whether or not the alleged property had the hallmark rights of transferability and excludability, which indicia are part of an individual's bundle of property rights. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435-36 (1982) (describing the right to dispose of property as part of an individual's bundle of property rights); see, e.g., Am. Pelagic Fishing Co. v. United States, 379 F.3d 1363, 1374 (Fed. Cir. 2004); Conti, 291 F.3d at 1341-42; Mitchell Arms, 7 F.3d at 216.

In Fuller, the Supreme Court refused to recognize a property interest in grazing permits issued under the Taylor Grazing Act, 43 U.S.C. § 315. In determining whether a property right existed, the Supreme Court focused on the revocability of the grazing permits and the clear Congressional expression in § 315b that the issuance of a permit under the Act "shall not create any right, title, interest, or estate in or to the lands." 43 U.S.C. § 315. The Court noted that § 315b makes "clear the congressional intent that no compensate property be created in the permit lands themselves as a result of the permit" Fuller, 409 U.S. at 494.

In Mitchell Arms, this court declined to recognize a property interest in a contract entered in accordance with the terms of a firearm import permit issued pursuant to 18 U.S.C. §§ 921-930 and suspended before the contract could be performed. Mitchell Arms, 7 F.3d at 216. Mitchell Arms held

that when a citizen voluntarily enters a market subject to pervasive government control he cannot be said to possess the right to exclude. Id. Specifically, this court concluded that the relevant right to exclude that the plaintiff lacked was the ability to exclude others from the market for the sale of firearms. Id.

In Conti, this court failed to find a compensable property interest in the petitioner's fishing permit, relying on: (1) the petitioner's inability to assign, sell, or otherwise transfer the permit; (2) the petitioner's lack of authority to exclude others from the Atlantic Swordfish Fishery; and (3) the government's retained right to revoke, suspend, or modify the permit under 50 C.F.R. § 635.4(a)(3). Conti, 291 F.3d at 1341-42. "The absence of crucial indicia of a property right, coupled with the government's irrefutable retention of the right to suspend, revoke, or modify Mr. Conti's swordfishing permit, compels the conclusion that the permit bestowed a revocable license, instead of a property right." Id. at 1342.

In American Pelagic, we held that there was no protectable property interest in fishery permits and authorizations on the grounds that the petitioner did not have the authority to assign, sell, or transfer its permit and authorization letter and that those legal instruments did not grant the petitioner exclusive privileges to fish for Atlantic mackerel and herring. 379 F.3d at 1374. This court reasoned that since nothing in the language of the regulations precluded the sanction or denial of a permit for reasons unrelated to enforcement, the

government had preserved these rights with respect to the permits and authorization letters issued under the regulation. Id.

In sum, the decisions by both the Supreme Court and this court imply that a compensable interest is indicated by the absence of express statutory language precluding the formation of a property right in combination with the presence of the right to transfer and the right to exclude. See, e.g., Fuller, 409 U.S. at 494; Am. Pelagic, 379 F.3d at 1374; Conti, 291 F.3d at 1341-42; Mitchell Arms, 7 F.3d at 216.

C. Peanut Quota as Property

The dimensions of any property interest the Members may have in peanut quota allotments are defined by the 1996 FAIR Act, which created the peanut quotas at issue. The 1996 Act created a right to plant and produce a certain amount of peanuts for a guaranteed minimum price. The government argues that this is no more a property right than government issued licenses or permits. The Members contend that this right is a property right because, unlike the permits and licenses discussed in Conti and American Pelagic, the provisions of the 1996 FAIR Act and state case law establish that a peanut quota allotment was transferable and exclusive. We agree with the Members,

1. Transferability

The right to transfer is a traditional hallmark of property. See Loretto, 458 U.S. at 435-36

(describing the right to dispose of property as part of an individual's bundle of property rights). The Members have established that the peanut quota was transferable.

The 1996 FAIR Act specifically allowed the peanut quota to be transferred, 7 U.S.C. § 1358a(a) (2000), albeit subject to certain limiting conditions. The 1996 FAIR Act provides, in relevant part:

> Transfers under this section shall be subject to the following conditions: (1) no allotment shall be transferred to a farm in another county; (2) no transfer of an allotment from a farm subject to a mortgage or other lien shall be permitted unless the transfer is agreed to by the lien-holders; (3) no sale of a farm allotment from a farm shall be permitted if any sale of allotment to the same farm has been made within the three immediately preceding crop years; (4) no transfer of allotment shall be effective until a record thereof is filed with the county committee of the county in which such transfer is made and such committee determines that the transfer complies with the provisions of this section; and (5) if the normal yield established by the county committee for the farm to which the allotment is transferred does not exceed the normal yield established by the county committee for the farm from which the allotment is transferred by more than

> 10 per centum, the lease or sale and transfer shall be approved acre for acre....

7 U.S.C. § 1358a(b) (2000).

Transferal of an allotment was historically subject to approval by the local branch of the Agricultural Stabilization and Conservation Service ("ASCS"). See In re Williams, 136 B.R. 311, 313 (Bankr. M.D. Ga. 1992). ASCS approval was constrained by federal law, which only allowed transfers to farms within the same or an adjacent county. See Shepard v. Fed. Land Bank of Columbia, 421 S.E.2d 763, 764 (Ga. Ct. App. 1992).

These restrictions on a quota holder's ability to transfer his or her quota do not distinguish quotas from other transferable goods that are inarguably property, e.g. alcohol and firearms. The mere fact that transfers of allotments are not unrestricted does not undermine the importance of transferability to the characterization of quotas as a form of property.

Further, the Members point out that peanut quotas were long regarded under state law to be personal assets, in part because of their transferable nature. In support of their claims, the Members cite a series of state court decisions that have held a peanut quota to be a personal asset. See, e.g., Mills v. Davis, 577 So. 2d 436 (Ala. 1991) (noting that peanut quotas are personal property subject to payment of debts, but ultimately dismissing appeal as untimely); McKim v. Kauffman, 424 S.E.2d 11 (Ga. Ct. App. 1992) (holding peanut quotas to be

property such that a failure to convey a quota under a contract constitutes breach). The government argues that these cases do not stand for the proposition that quotas are compensable property interests, but only illustrate that, in some circumstances, quotas are treated like property. The Members counter that the treatment of quotas as property implies that they are property for all intents and purposes.

The cases addressing the issue of whether an agricultural allotment is property are less than straightforward in their conclusions; courts have arrived at different conclusions, compare Walker v. Miller, 507 S.W.2d 606, 609 (Tex. App. 1974) ("An allotment under the [AAA] has been recognized as intangible personal property, subject to devise, inheritance, transfers and sales, division by a district court in divorce proceedings, and to treatment as property in bankruptcy proceedings. It is recognized that an allotment has a market value, and the statutory restrictions on transfer to not negate the possibility of transfer.") with Callaway v. Block, 763 F.2d 1283, 1290 (11th Cir. 1985) ("Appellants have no protected property interest in quotas per se nor in the specific quotas they had in 1983 or any other price year."), and even the holdings of individual courts are muddled, seeming to come down on both sides of the issue, see, e.g., In re Jackson. 169 B.R. 742, 749 n.2 (N.D. Fla. 1994) ("[C]ourts have stated that an allotment is a type of intangible personal property .... However, allotments cannot be considered as ordinary intangible property in isolation from the statutes and regulations which control their transfer.").

Nonetheless, to the extent that the government's argument relies on the notion that quotas are not transferable, we must disagree. Despite their apparent ambivalence about whether or not quotas are property, courts across the peanut growing states have held consistently that quotas are transferable, subject to statutory restrictions. See, e.g., Smith v. Smith, 656 So. 2d 814 (Ala. App. 1994) (holding transferable in divorce); McKim, 424 S.E.2d at 12-13 (recognizing transferable through sale); In re Williams, 136 B.R. 311 (M.D. Fla. 1992) (holding transferable in bankruptcy). In this case, the transferability of the quotas supports the conclusion that the quotas constitute property.

2. Excludability

The Supreme Court has recently recognized that the right to exclude is "perhaps the most fundamental of all property interests." Lingle v. Chevron U.S.A., Inc., 125 S.Ct. 2074, 2082 (2005). The Members contend that they have an exclusive interest in their respective peanut quota allotments. They argue that cases such as American Pelagic, Conti, and Mitchell Arms are distinguishable on the ground that the licenses awarded to the various citizens in those cases were not exclusive, whereas the peanut quota allotments awarded here were exclusive. Conversely, the government argues that, at most, peanut quota holders under the 1996 FAIR Act have the power to exclude others from taking advantage of their allotment and that this limited power of exclusion is no different from a fisherman's ability to exclude others from using his fishing license. The government contends that it is still the

sole arbiter of who has access to the peanut quota allotments in much the same way as it determines who shall be permitted to obtain a fishing license. The government's position fails to appreciate the difference between a license and a quota.

The salient difference between the licenses in the noted cases and the peanut quota allotment is that the value of the peanut quota is considerably more concrete. A license represents a limited suspension of the otherwise general restrictions imposed by the government—in the case of a fishing license, it is merely a representation by the government that it will not interfere with the licensee's efforts to catch fish. The number of licenses to be issued under such a scheme is not fixed. Each additional license dilutes the value of the previously issued licenses. So long as the government retains the discretion to determine the total number of licenses issued, the number of market entrants is indeterminate. Such a license is by its very nature not exclusive. Neither the fisherman nor the firearms salesman can exclude later licensees from entering the market, increasing competition, and thereby diminishing the value of his license.

Conversely, the awarding of each additional peanut quota under the 1998 FAIR Act did not increase competition. Peanut quotas represented a right to plant and produce a certain amount of peanuts at a certain price in specific crop years. The statutory scheme limited the number of total pounds of quota peanuts and, in conjunction with the price supports, guaranteed a minimum price on the

peanuts. Once a particular quota had been awarded, the granting of further quotas did not dilute that allotment. Under the quota program, the government served as a surety on large agricultural loans for any quota holder who grew peanuts. That benefit, which was a form of monetary subsidy, accompanied every peanut quota that was issued and was not subject to dilution by the issuance of additional peanut quotas. By awarding a quota holder a set price on a fixed quantity of peanuts, the government established a defined market for each quota holder—a market exclusive to that quota holder. Thus, the fact that the government was entitled to confer quota benefits without any prescribed limitation does not mean that the quotas were not a form of property.

A property right accrues when the government has seen fit to take a limited resource and secure it for the benefit of an individual or a predetermined group of individuals. The peanut quota holders possessed an excludable interest, because the peanut quota program isolated their particular interest from competition. For the reasons stated, we conclude that the Members established a property interest cognizable under the Fifth Amendment.

D. Peanut Quota Not Compensable

The question, therefore, is not whether the peanut quotas have aspects of property, but whether Congress must pay the owners of peanut quotas compensation when it takes steps that render the quotas less valuable, or even valueless. The answer

is no, because the property interest represented by the peanut quota is entirely the product of a government program unilaterally extending benefits to the quota holders, and nothing in the terms of the statute indicated that the benefits could not be altered or extinguished at the government's election. By analogy, undoubtedly food stamps in the hands of food stamp recipients are property. Theft or fraud that deprived the owner of food stamps would surely be punishable as theft or fraud directed at property. But, the government's decision to terminate the food stamp program before the food stamps could be issued would not give rise to an obligation to compensate prospective holders of the stamps.

The same principle applies here. Peanut quotas are property, but they are a form of property that is subject to alteration or elimination by changes in the government program that gave them value. The peanut quota granted under the 1996 FAIR Act was a privilege extended by Congress to support farmers during times of market stress as a general policy to attenuate and smooth out the fluctuations of the market place. Thus, the holders of peanut quotas, like the holders of food stamps, have no legally protected right against the government's making changes in the underlying program and no right to compensation for the loss in value resulting from the changes. Bowen v. Gillard, 483 U.S. 587, 604 (1987) ("Congress is not, by virtue of having instituted a social welfare program, bound to continue it...").

The explanation of why government termination of such a program does not give rise to a

right of compensation has been stated in different ways at different times. It is sometimes said that the property holder's rights in the property have not "vested," see Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41, 55 (1986); it is sometimes said that the property holder has no investment-backed expectation of maintaining a continued right to the property, see Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 124 (1978); and it is sometimes said that the property is in the form of a gratuity that the government has explicitly or implicitly retained the right to alter or revoke, see Gilliard, 483 U.S. at 604. Each of these characterizations captures the essence of the reason the government's action does not give rise to a constitutional duty of compensation: The government is free to create programs that convey benefits in the form of property, but, unless the statute itself or surrounding circumstances indicate that such conveyances are intended to be irrevocable, the government does not forfeit its right to withdraw those benefits or qualify them as it chooses. Since Congress at all times retains the ability to amend statutes, a power which inheres in its authority to legislate, Congress at all times retains the right to revoke legislatively created entitlements. Pub. Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. at 52 (noting that courts should be "extremely reluctant" to construe statues in a manner that forecloses the ability of Congress to exercise its legislative powers). In this case, there is nothing to suggest that the peanut quota program was intended to provide irrevocable benefits to quota holders.

The Members contend that the sunset clause of the 1996 FAIR Act somehow transmuted the regulatory scheme promulgated by the act into an irrevocable grant of property. The Members argue that 1996 FAIR Act, § 155(h), which stated "[s]ubsections (a) through (g) shall be effective only for the 1996 through 2002 crops of peanuts," acted to make the provisions of the 1996 FAIR Act irrevocable. Thus, they maintain that the 2002 Act effectuated a taking by impermissibly applying retroactively to the 2002 crop of peanuts for which price supports had already been established under the 1996 Act.

The inclusion of a sunset provision does not operate to transform a regulatory scheme for the distribution of subsidies into a compensable property interest under the Fifth Amendment. We decline the Members' invitation to hold that statutory limitations to the applicability of statutes constitute an abandonment of Congress's inherent authority to legislate. Rather, the sunset provision highlights Congress's intention that the price support provisions be temporary in nature.

To be sure, quota holders who transferred their quotas in the expectation that the benefits of the quota program would continue, in effect unchanged, lost the value of their quotas when the program was altered. But, the fact that quota holders expected to continue to derive benefits from the program does not create rights to compensation from the government. Therefore, as we view this case, the change in the quota program deprived the quota holder's property of value, but the

government's conduct did not constitute a compensable taking of that property.

CONCLUSION

While we conclude that the Members do possess a property interest in the peanut quotas awarded to them under the 1996 FAIR Act, we also conclude that this right is not compensable. Consequently, the 2002 Act did not effect a taking of a Fifth Amendment property right. Because no taking occurred, we do not reach the Members' argument that they were inadequately compensated for their claim. Accordingly, the judgment of the trial court is

AFFIRMED.

COSTS

Each party shall bear its own costs.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

04-5099

MEMBERS OF THE
PEANUT QUOTA HOLDERS ASSOCIATION, INC.,
AUGUSTUS GARRETT, JEROME PAULK,
FAYE PAULK,
and D. U. PULLUM,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

ORDER

[ENTERED: December 25, 2005]

* * * * *

United States Court of Appeals
for the Federal Circuit

ORDER

A petition for rehearing en banc having been filed by the APPELLANTS, and a response thereto having been invited by the court and filed by the APPELLEE, and the matter having first been referred as a petition for rehearing to the panel that

heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on December 30, 2005.

FOR THE COURT,

/s/

Jan Horbaly
Clerk

Dated: December 23, 2005

cc: David Wm. Boone
Jane W. Vanneman

PEANUT QUOTA HOLDERS V US, 04-5099
(CFC – 02-CV-1664)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 04-5099

MEMBERS OF THE
PEANUT QUOTA HOLDERS ASSOCIATION, INC,
AUGUSTUS GARRETT, JEROME PAULK,
FAYE PAULK, and D.U- PULLUM

Plaintiff-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

APPELLEE'S OPPOSITION TO APPELLANTS' PETITION FOR REHEARING *EN BANC*

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TABLE OF CONTENTS

PAGES

APPELLEE'S OPPOSITION TO APPELLANTS' PETITION FOR REHEARING *ENBANC* 1

Statement 1

Argument 3

I. The Panel Did Not Violate *Kelo* 6

II. The Panel's Decision Is Not Contrary to *Eastern Enterprises* 10

III. The Panel Decision Does Not Conflict With *Maritrans* 12

CONCLUSION 14

TABLE OF AUTHORITIES

CASES PAGES

Arctic King v. United States,
59 Fed. Cl. 360 (2004) 9

Calloway v. Block,
763 F.2d 1283 (11th Cir.1985) 8

Competitive Enterprises Institute v. USDA,
954 F. Supp. 265 (D.D.C 1996) 8

Cook Farms,
302 S.E.2d 574 (Ga. App. 1983) 9

Eastern Enterprises v. Apfel,
524 U.S. 498 (1998) 5, 10, 11

Kelo v. City of New London,
125 S.Ct 2655 (2005) 5, 6, 9

Loveladies Harbor v. United States,
21 Cl. Ct 153(1990), aff'd,
28 F.3d 1171 (Fed. Cir. 1994) 13

Maritrans Inc. v. United States,
342 F.3d 1344 (Fed. Cir. 2003).....5, 12, 13

Maritrans v. United States,
51 Fed. Cl. 277 (2001) 13

Members of Peanut Quota Holders v.
United States,
60 Fed. Cl. 525 (2004) 2, 7

New York Central R.R. v. White,
243 U.S. 188 (1917) 9

Rogers Truck Lines v. United States,
14 Cl. Ct 108 (1987) 7

STATUTES AND REGULATIONS

7 U.S.C. §1358-1 2

7U.S.C. §1358 4

7 U.S.C. §7952-54 6

7 U.S.C. §7271 3

7 U.S.C. §7957 6

7 U.S.C. §7957 3

7 U.S.C. §7959 6

MISCELLANEOUS

H.R. Conf. Rep. 107-424 (May 1, 2002) 8

1990 USCCAN 4656-5284 8

Agricultural Allotments As Property,
79 Harv.L.Rev., at 1203 13

No. 04-5099

THE UNTIED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMBERS OF THE PEANUT QUOTA HOLDERS ASSOCIATION, INC., AUGUSTUS GARRETT, JEROME PAULK, FAYE PAULK, and D.U. PULLUM
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

APPELLEE'S OPPOSTION TO APPELLANTS' PETITION FOR REHEARING *EN BANC*

STATEMENT

Petitioners, individual members of the Peanut Quota Holder Association, Inc., owned farms to which peanut quotas had been allocated under the Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, § 155, 110 Stat. 888, 922-30 (1996 Act). The peanut quotas allowed the Petitioners to obtain favorable loans for their peanut crop which effectively maintained an artificial minimum price for the crop. Beginning in the late 1960s and extending through the abolition of the program, the quotas could be sold or leased and the Petitioners allege that they leased their quotas to others.

In 2002, Congress amended the peanut quota program by repealing the marketing quota program, by establishing a new program of benefits, the Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171 §1301-1310, 116 Stat 124, 166-83 (2002 Act), and by establishing a "buyout" of quota holders. Pursuant to the new program, the quota system was abolished.[1] Any farm owner, such as Petitioners, may produce peanuts and receive some financial benefits. However, under the 2002 Act, certain other benefits are available only to those who had actually produced peanuts during the period 1998-2001. Because Petitioners owned farms but did not engage in the production of peanuts during 1998-2001, but rather leased their quotas, certain new benefits under the 2002 Act are not available to Petitioners.

Petitioners filed this suit claiming that the Government took the quotas they possess under the 1996 Act and that, accordingly, they were entitled to just compensation under the Fifth Amendment. The Panel held that the quotas which Petitioners leased were "property" but that no taking had occurred. According to the Panel, the quotas constituted legislatively-created benefits and neither the statute nor the surrounding circumstances indicated that

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[1] The Panel appears to have erroneously assumed that the 2002 Act continued the quota system. Quotas were authorized pursuant to 7 U.S.C. §1358-1 (b)(2000 ed.), and repealed by Section 1309 of the 2002 Act 116 Stat. 179. There are now no marketing restrictions that limit, for any use, the possible pounds that can be marketed. Therefore, anyone can market an unlimited amount of peanuts for domestic food or other uses. Members of Peanut Quota Holders v. United States, 60 Fed. Cl. 525, 527 (2004)(plaintiffs are free to produce as many peanuts as they can on their farms without penalty).

Congress intended those benefits to be irrevocable. Accordingly, the Congress retained the ability to legislatively abolish the benefits without creating a taking for which compensation was due.

ARGUMENT

The fundamental premise of the petition is that Congress "transferred" Petitioners' peanut marketing quotas to those to whom Petitioners previously leased their quotas. This allegation is incorrect. Nothing was transferred. Congress abolished one program which provided for peanut quotas and established another program which does not include a quota system.

Pursuant to the new program, those persons who owned farms and had leased their quotas during the period 1998-2001, such as Petitioners, are eligible for marketing loans on the same terms as those to whom they had leased their quotas under the 1996 Act. 7 U.S.C. 7957(b).

Petitioners are not eligible for two new types of payments - direct payments (DP) and countercyclical payments (CCP) - because they did not produce peanuts on their farms during the four years from 1998 to 2001, as required by the 2002 Act. 7 U.S.C. 7952-53; See 7 CFR Part 1405, 1412.

Finally, pursuant to the new program, persons such as Petitioners received a "buyout" in recognition of the abolition of quotas. The one-time lump sum amount which could be received pursuant to this provision is almost twice the support level

under the 1996 Act and far more than the presumed leased value of the quota for the 2002 crop year (accounting for production costs and profit), the last year addressed in the 1996 Act. 7 U.S.C. 7959; 7 U.S.C. 7271 (2002 ed). 7 C.F.R. Part 1412.

In essence, the Petitioners contend that they are entitled to compensation because, although they are eligible for marketing loans, they are not eligible for DP and CCP under the 2002 Act. They contend that their ineligibility entitled them to compensation because section 155(i)(6) of the 1996 Act provided, by amendment to 7 U.S.C. 1358b (2000 ed.) that "[a]ny farm poundage quota transferred ... [pursuant to the statute] shall not result in any reduction in the farm poundage quota for the transferring farm if the transferred quota is produced or considered produced on the receiving farm. See 7 U.S.C. §1358b(l)(6)(2000 ed). According to the Petitioners, they relied upon this provision of the 1996 Act when they decided to lease their quota. In effect, they contend that the 2002 Act's limitation on eligibility for DP and CCP to persons that actually produced peanuts under the 1996 Act constituted a transfer of their quotas under the 1996 Act to those persons that actually produced peanuts. Petitioners contend that this "transfer" violated their expectation that their quotas would not be reduced, engendered by section 155(i)(6). Finally, the Petitioners contend that the amount that they received under the "buyout" did not constitute the fair market value of their quota.[2]

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[2] Because Petitioners do not develop this argument, we do not specifically address it further.

Petitioners are not entitled to compensation because, as the Panel correctly held, there has been no taking. Congress abolished one program providing for quotas and replaced it with another program which does not include a quota system. Petitioners do not deny that Congress could take this action without effecting a taking. Petitioners rely solely upon a provision of the 1996 Act which provided that their quotas would not be reduced solely because they leased their quotas. However, the quota was not reduced; rather, it was eliminated, and now, everyone can market an unlimited amount of peanuts for domestic food use (the use regulated by the former quota system). In any event, the provision of the 1996 Act governing quotas could not have been reasonably interpreted as a promise that the quota system would never be repealed. In fact, Congress has repealed the quota system and the Petitioners' quotas have not been reduced. Indeed, although Petitioners phrase their argument in terms of a transfer of or reduction in their quotas, a close reading of their petition demonstrates that the quotas were valuable because they resulted in the provision of price supports at a higher rate than non-quota peanuts ("additional" peanuts) under the 1996 Act, and, thus, gave them a competitive advantage as compared to non-quota holders. Under the 2002 Act, Petitioners are not eligible for the new payments (e.g., DP and CCP) because they did not produce peanuts during the requisite period. Thus, Petitioners' contention amounts to a contention that they are entitled to compensation because they are no longer eligible for a benefit which had provided them a competitive advantage in the leasing markets. But nothing required the Congress to

provide for Petitioners' continued eligibility for any or all peanut program benefits, much less a competitive leasing advantage. Even the statute upon which Petitioners rely regarding reductions in quota cannot be twisted so as to be considered a guarantee that Petitioners' eligibility for program benefits, and/or a competitive advantage over producers/lessees, would continue. Ending the quota program, in fact, released the restrictions of the former quota program and expanded, rather than reduced, the amount of peanuts that could be marketed for domestic food use.

Petitioners incorrectly rely upon Kelo v. City of New London, 125 S.Ct. 2655 (2005), because nothing belonging to the Petitioners has been transferred to another person. Rather, one program in which Petitioners participated has been abolished in its entirety and a new program has been established in which Petitioners may participate. The Panel's decision is not contrary to the principles of Eastern Enterprises v. Apfel, 524 U.S. 498 (1998), because there is no retroactivity. Finally, the Panel's decision is not contrary to Maritrans Inc. v United States, 342 F.3d 1344 (Fed. Cir. 2003), because no one has been singled out to bear a burden which should be borne by the public as a whole.

I. The Panel Did Not Violate *Kelo*

Petitioners' reliance upon the Supreme Court's decision in Kelo v. City of New London, 125 S.Ct. 2655 (2005), issued after the Panel issued its decision in this case, is misplaced.

Petitioners acknowledge that they do not rely upon the holding of Kelo which actually rejected the claim of the property owner. Instead, they rely upon an observation by the Court to the effect that the United States may not take the property of one person for "the sole purpose of transferring it" to another private party.

Even if that proposition is true, it is not relevant here. In the 2002 Act, Congress ended the old quota program as of May 13, 2002, effective with the 2002 crop. In section 1301 et seq., Congress eliminated the quota restrictions so as to allow all producers on all farms to market as many peanuts as they wish for domestic food use. See section 1309 of the Act, 116. Stat. 179. 7 U.S.C. §7959. Moreover, under the 2002 Act, all producers on all farms, including Petitioners, are eligible for the new single-tiered loan system. 7 U.S.C. §7957.

The 2002 Act also provides that those who engaged in the production of peanuts during the period 1998-2001 are provided a "base" in pounds (7 U.S.C. §7952) derived from then-production history. The DP and tie CCP are calculated on the basis of this poundage base.[3]

Because Petitioners did not produce peanuts during the requisite period, they were not allocated a "base" and, hence, they are not eligible for the DP and CCP payments. But DP and CCP eligibilities

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[3] The new base is not a quota. It does not restrict any marketings. It is not a license to market. Rather, it creates an eligibility for certain new payments which are not dependent upon any current production of peanuts.

are not quotas and do not function as quotas. Rather, as the trial court correctly described them, the program benefit under the DP program is a payment calculated according to the poundage of the "base" (calculated upon historical production), and the payment under the CCP program is based upon the "target price" which is set by statute, see Members of Peanut Quota Holders Ass'n, 60 Fed. CL 524, 526-27 (2004), with the "target" price per pound set at a lower level than the former quota rate per pound. 7 U.S.C. 7952-54. Congress crafted these new payments for those persons who had produced peanuts during 1998 and 2001. Anyone who produced peanuts during that period was assigned a poundage "base" upon which the DP and CCP payments would be made, but no current peanut production was required. By contrast, market assistance loans were made available to everyone who produced peanuts. In contrast to the former quota program, the DP and CCP programs do not include any restriction on who can or cannot market peanuts for domestic food use.[4] See Members of Peanut Quota Holders Ass'n, 60 Fed. Cl. at 526-27. In sum, in contrast to the pre-2002 Act, any and all persons under the new system, including Petitioners, may produce all the peanuts they wish for domestic food use and receive loans equally with all other farms. No base is required for any marketing or any loan, nor is any quota allocated or needed under this new program.

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[4] See Rogers Truck Lines v. United States, 14 Cl. Ct. 108 (1987)(no constitutionally protected right to freedom from competition).

Thus, there has been no transfer of Petitioners' quotas. There is no quota. Congress abolished the quotas in favor of a new program. Petitioners are not eligible for portions of this new program. However, this ineligibility does not result from a transfer of their quotas. Rather, under one program, their farms were eligible for a certain type of benefit, which gave them a competitive advantage. Subsequently, Congress abolished that type of aid and established a new multi-faceted program. Petitioners are not eligible for parts of this new program because Congress adopted eligibility criteria which the Petitioners cannot fulfill. However, as the Panel correctly explained, nothing prevented the Congress from deciding to utilize the criteria it considered relevant to establish eligibility for DP and CCP. Congress' choice of pre-2002 production history as one criterion for eligibility represents a policy choice and this policy choice does not entitle Petitioners to compensation on the ground that they cannot satisfy the criterion selected by Congress.

Moreover, the repeal of the quota should have come as no surprise to Petitioners. Immediately after enactment of the 1996 Act, Congress began to address some of the issues important to the peanut industry, including the preference for producers, as compared to mere landowners/non-producers, and the fact that the added costs that peanut producers incurred in leasing quotas from those with farms with an allocated quota contributed to the fact that the domestically-subsidized price of peanuts, for consumers and for Government food programs, was almost twice the world price of peanuts. The policy

choices that led to the 2002 Act also built upon earlier developments in international trade for agricultural commodities, since the 1960s, and again in the 1980s and 1990s.[5] In various trade bills, Congress had moved gradually towards a more market-oriented approach for virtually all agricultural commodities, including peanuts.[6] Indeed, for more than twenty years after Calloway v. Block, 763 F.2d 1283, 1290 (11th Cir. 1985), the seminal case on peanut quotas, which addressed policy shifts in the quota program away from farm owners and in favor of producers, there were a variety of complex factors which led to changes in the peanut program, including: evolving political and policy considerations involving domestic considerations relating to peanuts; significant developments in laws and treaties governing international trade; and, Federal budget considerations relating to the costs of the peanut program. Therefore, it was only a matter of time before Congress repealed the peanut quotas, as it

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[5] See generally H.R. Conf. Rep. 107-424 (May 1,2002).

[6] E.g., 1990 USCCAN 4657, 4675-76.; 1990 USCCAN 4656-5284. See generally Competitive Enterprises Institute v. USDA, 954 F. Supp. 265, 273 (D.D.C 1996). H.R. Conf. Rep. 107-424 (May 1, 2002), 2002 USCCAN 141.

had repealed quotas for all other agricultural commodities (except tobacco) in earlier farm bills.[7]

Finally, even if there was a transfer of Petitioners' quota, this was not the "sole purpose" of the 2002 Act. As described above, the peanut program was changed in 2002 for many reasons, just as many reasons caused the program to change in years since the early 1940s, when the first peanut program was established.

Accordingly, the Panel did not violate Kelo.

II. The Panel's Decision Is Not Contrary *to Eastem Enterprises*

As a result of their mischaracterizations of the old and new peanut programs, Petitioners' reliance upon Eastern Enterprises v. Apfel, 524 U.S. 498 (1998), is misplaced. Petitioners meet *none* of the Eastern Enterprises standards relating to

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[7] In Cook Farms, 302 S.E.2d 574 (Ga.App. 1983), the state court warned long ago that those participating in the peanut quota program should protect themselves in lease terms against possible changes in the law. See Arctic King v. United States, 59 Fed.CL 360, 379 (2004) (foreseeable that Congress would remedy overcapitalization of pollack fishery; focus properly upon recent catch history and production levels); see New York Central R.R. v. White, 243 U.S. 188, 198 (1917)(no person has vested interest in rule of law entitling person to unchanged Federal benefits).

Therefore, as Petitioners appear to recognize, Congress possessed the right, to grant to those who had actually engaged in the production of peanuts for 1998-2001, the four years prior to the 2002 Farm Bill, the status of "historic peanut producer" for purposes of calculating benefits under the new 2002 bill.

"retroactive" legislation as to quota restrictions and marketing loans. First, no part of the legislation was retroactive. It involved only future payments and marketings. It did not assign liabilities for past activities, as in Eastern Enterprises. In Eastern Enterprises, the retroactive effect was severe because it extended decades into the past. Further, to the extent that Petitioners rely upon Eastern Enterprises for their argument that somehow the 2002 Act retroactively violated the 1996 Act in "reducing" their quota because they were not producers from 1998-2001, Petitioners' reliance is misplaced. Petitioners' quotas were not "reduced" for any purpose when the 1996 Act was in force, or ever (the quota restriction was simply eliminated) and the 1996 provision upon which they rely – that the lease of their quota would not reduce their quota – is no longer in force due to the 2002 Act.

Further, Petitioners proffered to the trial court little, if any, evidence as to what they now claim are undisputed substantial economic burdens, and/or as to causation — whether it was the repeal of the quota, or other factors, that may have imposed an economic burden upon one or more of the named individual Petitioners. While they claim that the 2002 Act imposed a "substantial" economic burden upon them (App.Br.12), they fail to address key points that we addressed in our briefs, for example, relating to the buyout payments - that the amount of the buyout was generous, substantially more per pound than the old quota support price for the 2002 crop under the 1996 Act, the last crop addressed in that Act. Moreover, in the 2002 Farm Bill, Congress did not deprive Petitioners of their farmland, farm

equipment, or their crops. Petitioners are also not excluded from the peanut loan program or from peanut markets. Rather, like all persons now, Petitioners are able to secure marketing loans upon the same terms as any other producer, grow an unlimited quantity of peanuts, and market them without penalty. Or, Petitioners were able to offer their land to historic producers who could have designated Petitioners' land as the new "base" with a particular yield level, such that the producers would lease the land or otherwise compensate Petitioners for the use of the land with its DP and CCP benefits under the new base program.[8]

Thus, as the Panel correctly recognized, Petitioners failed to demonstrate that they experienced any significant adverse economic effect caused by the repeal of the quota.

Accordingly, the 2002 Farm Bill did not constitute an unlawful retroactive taking under

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[8] Petitioners argued earlier that the 2002 Farm Bill destroyed, totally, the quota "asset." However, they confused matters by claiming that the "dollar value of the interferences varies with different classes of quota holder..." Id. While the trial court did not certify any class pursuant to Rule23, Petitioners argued on behalf of three undefined classes.

However one views these three "classes," Petitioners do not dispute that, under the 2002 Farm Bill, all of them are eligible for marketing loans for peanuts at $355 per ton, they were eligible for $.55 per pound quota buyout, and their land could be designated by those defined as historic producers as the base from which future DP and CCP payments would be made. Thus, there was not a quota "asset" that was destroyed "in total," as Petitioners contended.

Eastern Enterprises and the Government did not transform Petitioners' lease arrangements into "involuntary sales." Therefore, the Panel correctly held that no compensation was owed to Petitioners.

III. The Panel Decision Does Not Conflict With *Maritrans*

Petitioners appear to contend that they were singled out for adverse treatment by the 2002 Act They argue that Congress imposed an unlawful burden upon them because the 2002 Act "fails to deal uniformly with the industry and with the rules that governed all participants in the industry prior to that Act."

If we understand Petitioners' contentions correctly, the decision in Maritrans Inc. v. United State, 342 F.3d 1344 (Fed. Cir. 2003), does not provide any support to Petitioners' petition. Petitioners were not "singled out" for any new restrictions with respect to the new peanut base program created. Rather, Congress lifted all restrictions on peanut production, and did so equally for everyone involved either in the production of peanuts or those who owned land upon which peanuts could be grown — Petitioner land-owners and peanut producers. Congress provided for a new and complex structure of payments and benefits - including a new "base" program of payments, and non-recourse loans — and ultimately decided who would receive the new DP and CCP payments and who would not.

In any event. Petitioners cite to no law or authority for their proposition that, absent due process concerns, Congress must "deal uniformly" with the peanut industry and "with the rules that governed all participants in the industry prior to that Act." App.Br.14. There is no such authority. As the Panel concluded, Congress possesses the power to legislate. And, particularly in a subject matter area so broad as nationwide farm bills and agricultural commodities, it is difficult to imagine any standard by which courts could evaluate whether Congress dealt "uniformly" with all participants in any particular industry, such as the peanut industry, with all of the implications for the domestic economy, international trade, and the Federal budget.

Therefore, contrary to the arguments made in their petition, this Court's decision in Maritrans dooms their claim. In Maritrans, the property declined in value by only 13.1 per cent due to the Government's action. This decline was not enough of a diminution in value to indicate that Maritrans was carrying an undue portion of the burden created by the legislation. Id. at 1358.[9] The Court noted that Maritrans appeared able to regain a significant portion of its initial investment in the barges by selling them. Thus, the economic impact factor weighed against Maritrans' takings claim. Id. at 1358. Cf. Loveladies Harbor v. United States, 21 Cl. Ct. 153 (1990), aff'd, 28 F.3d 1171 (Fed. Cir. 1994)

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[9] The Court of Federal Claims cited numerous cases that suggested that diminutions in value approaching more than 85 to 90 per cent do not necessarily establish a takings. Maritrans v. United States, 51 Fed. Cl. 277, 282 (2001).

(property essentially worthless after Government action).

Here, Petitioners still own their land, some fanning equipment, and they can use their land to grow peanuts or other crops. Moreover, they were eligible for the quota buyout. Their land is hardly "worthless" as a result of the 2002 Bill, as was the case in Loveladies Harbor.[10]

Accordingly, the Panel decision conflicts with nothing in Maritrans.

Conclusion

For the foregoing reasons, appellee respectfully requests that this Court deny Petitioners' petition for rehearing en banc.

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[10] In any event, Petitioners failed before the trial court even to attempt to quantify the extent, if any, of any diminution in the value of their land. Nor did they provide any evidence as to the *remaining* value of their farm land. See *Agricultural Allotments As Property*, 79 Harv.L.Rev. at 1203 (land values affected by many factors, allotments are bat one). Petitioners barely mention this theory on appeal.

Respectfully submitted,

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November 30, 2005

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on November 30, 2005, I caused to be served by United States mail, postage prepaid, copies of "APPELLEE'S OPPOSITION TO Petitioners' PETITION FOR REHEARING EN BANC" addressed as follows:

David Wm. Boone
Boone & Stone
3166 Matbieson Drive
Atlanta, Georgia 30305

/s/

In the United States Court of Federal Claims

No. 02-1664C
(Filed April 30, 2004)

****

MEMBERS OF THE PEANUT QUOTA HOLDERS ASSOCIATION, INC., *et al.*,	* Takings; summary judgment; peanut quotas, 7 U.S.C. §§ 1358-1359 (2000); Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134 (codified at 7 U.S.C.A. §§ 7951-7960 (West Supp. 2003)); property interest.
Plaintiffs,	
v.	
THE UNITED STATES,	
Defendant.	

****

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Jane W. Vanneman, Washington, DC, with whom was Assistant Attorney General Peter D. Kiesler, for defendant. Terrence Jackson and Michael Gurwitz, Office of the General Counsel, Department of Agriculture, of counsel.

OPINION

MILLER, Judge.

This case is before the court after argument on defendant's motion for summary judgment and motion to dismiss plaintiffs' claim for lack of subject matter jurisdiction, pursuant to RCFC 12(b)(l) or, alternatively, for failure to state a claim upon which relief can be granted, pursuant to RCFC 12(b)(6). Plaintiffs are a group farmers who held peanut production quotas that entitled them to certain benefits. In accordance with then-current regulations, plaintiffs leased their quotas to other farmers who produced peanuts and benefitted from the leased quotas. A subsequent act of Congress eliminated plaintiffs' quotas and awarded benefits to actual growers. The issue before the court is whether the elimination of plaintiffs' quotas constituted a taking of property through federal regulation for which compensation is due under the Takings Clause of the Fifth Amendment.[1]

FACTS

The parties agree on the dispositive facts. The Peanut Quota Holders Association, Inc., is comprised of four residents of the state of Georgia who owned peanut quota allotments ("plaintiffs"). The peanut quota allotments that plaintiffs held were part of Congress's regulation of agricultural commodities, until they were eliminated by the Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134, codified at 7 U.S.C.A. §§ 7951-7960

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[1] The parties agreed to defer action on plaintiffs' request for class action certification until the court ruled on defendant's dispositive motion. See Transcript of Proceedings, Members of the Peanut Quota Holders Assoc., Inc. v. United States, No. 02-1664C at 4-5 (Fed. Cl. Jan. 23, 2003).

(West Supp. 2003) (the "2002 Act"), the subject of the present litigation.

In response to a national depression, Congress enacted the Agricultural Adjustment Act of 1938, currently codified at 7 U.S.C. § 1281 (2000) (the "1938 Act"), which terminated the free market production and sale of agricultural commodities within the United States, including peanuts. Or, as plaintiffs more colorfully put it, "Congress dismantled the free market agriculture system of this country, with the passage of... "The 1938 Act."' Pls.' Br. filed Nov. 20, 2003, at 3.[2] In 1949 regulation of the peanut market began to include price supports, under which certain producers received government-inflated prices through direct payments, in addition to existing restrictions on competition. Agricultural Act of 1949, 7 U.S.C. §§ 1421-1471j (the "1949 Act"). Support also took the form of marketing quotas, which allowed the owners to produce peanuts without penalty. See 7 U.S.C. § 1358(2000). See generally, Competitive Enters. Inst. v. United States Dept. of Agric., 954 F. Supp 265, 267-69 (D.D.C. 1996) (discussing regulation of peanut production); Carruth v. United States, 224 Ct. Cl. 422, 427-28 (1980) (same).

Initially, these quotas were allotted by acre, on which the holder could produce his capacity of

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[2] Congress's first attempt at regulating the agriculture market was in 1933, but that act was found unconstitutional because payments to farmers were funded by taxes on processors. United States v. Butler, 297 U.S. 1 (1936). Payments under the 1938 Act were effected by congressional appropriation from general federal revenues.

peanuts without penalty. The acreage on which quota peanuts could be produced was divided by state, county, and individual farms. Some farmers increased their quota holdings by purchasing them from the farmers to whom they were originally issued. See Affidavit of Faye Paulk, Nov. 12, 2003, at ¶ 8.

However, by 1977 technological improvements had increased substantially the yield of peanuts per acre, prompting Congress to enact the Food and Agriculture Act of 1977, Pub. L. No. 95-113, §§ 801-807, 91 Stat. 913 (the "1977 Act"). The 1977 Act instituted poundage quotas based on the weight of peanuts produced. The new poundage quotas applied only to peanuts destined for domestic edible use. Peanuts were not subject to the new quotas if grown for export or for crushing into oil. 7 U.S.C. §§ 1358(v), 1359(m) (1978). Quota peanuts received greater marketing assistance and higher loan amounts than non-quota peanuts.

By 1981 Congress terminated peanut quotas allocated by acre, leaving only the quotas based on poundage. The Agriculture and Food Act of 1981, Pub. L. No. 97-98, §§ 701-707, 95 Stat. 1213, 1248 (the "1981 Act"). The 1981 Act retained the two-tiered system based on poundage. Under the 1977 and 1981 Acts, a farmer who previously held an acreage quota now received a poundage quota. Although producers who did not benefit from holding a quota could produce peanuts, they did not receive the more generous support from the Government that the peanut quota holders received.

Due to the Government's managing of the peanut market, consumers paid a higher price for peanuts within the United States, and taxpayers absorbed the increasing costs of administering the program. These concerns gestated in Congress until the enactment of the Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-427, § 155(i)(2), 110 Stat. 888, 928 (the "1996 Act"). The 1996 Act ended direct payments to producers and set loan rates through 2002.

The price support for peanut producers under the program took the form of marketing loans. The U.S. Department of Agriculture (the "USDA") extends loans to marketing associations, which, in turn, make loans to peanut producers. The USDA sets loan rates and the loans are non-recourse, such that the producer is not personally liable for the loan. Instead, producers pledge their peanut crop as collateral for the loan. In the event that profits from the sale of the peanuts do not cover the loan amount, the marketing association, and, by default, the USDA, make up the difference. If the sale of the peanut crop does cover the loan amount, the producer repays the loan and retains any excess profit.

The 1996 Act froze the loan rate for quota peanuts at $610.00 per ton. By comparison, the loan rate for non-quota peanuts in 1997 was $132.00 per ton. 1996 Act, § 155(a)(2). The loan rate differential, combined with restrictions on production and importation, gave quota holders a considerable advantage in the peanut market.

Congressional tinkering with the program was constant from its inception, culminating with the 2002 Act. Pressured by free trade agreements and mounting administrative costs, Congress amended the program by repealing the marketing quota program, establishing a "buyout" of quota holders, and creating a new price support program. See 2002 Act, § 1309.

By repealing the marketing quota program contained in 7 U.S.C. §§ 1357-1359a (1996), plaintiffs lost the ability to receive financial assistance for producing peanuts and no longer enjoyed the benefit of reduced competition. Rather than leave former quota holders with no entitlement, Congress enacted a "buyout" as part of the 2002 Act. The buyout authorized a one-time payment to quota holders of $0.55 per pound, derived from a payment of $0.11 per pound for five years. 2002 Act, § 1309(b)(1).

After the 2002 Act, anyone could now grow and market unlimited quantities of peanuts without penalty or restriction. However, a price support program was retained under the 2002 Act. The new price support program included both direct payments to peanut producers and counter-cyclical payments, which allowed payments to be made to producers when the market price of peanuts was below a "target" set by the USDA. 7 C.F.R. §§ 1405, 1412 (2003). Rather than grant the new price support program to the same individuals who held quotas under the prior program, Congress crafted a new basis for the price supports that included only those who produced peanuts during the four years

before enactment of the 2002 Act, 1998 to 2001. 2002 Act, § 1303. Anyone who produced peanuts during that period was assigned a base upon which price supports would be paid.

The 2002 Act defined eligibility for the new quota basis as a "producer on a farm in the United States that produced or was prevented from planting peanuts during any or all of the 1998 through 2001 crop years." 2002 Act, § 1301(5). Thus, the basis was available to "an owner, operator, landlord, tenant, or sharecropper that shares in the risk of producing a crop on a farm and is entitled to share in the crop available for marketing from the farm. Id. § 1301(8). This definition of producer differed from that in previous farm acts, including the 1996 Act, insofar as it excluded from consideration farmers who leased or transferred their quotas to other producers. 7 C.F.R. § 729.214(m) (2003). Prior to the 2002 Act, farmers were considered producers even if they had leased their quotas and, as a consequence, did not share in the risk of producing a crop.

In contrast to the 2002 Act, the 1996 Act specifically allowed quota holders to sell or lease their quotas to other producers. 1996 Act, § 155(i)(6)(A). The 1996 Act, like previous farm acts, not only allowed the transfer of quotas, but specifically protected transferors from a subsequent reduction in their quotas: "Any farm poundage quota transferred under this paragraph shall not result in any reduction in the farm poundage quota for the transferring farm if the transferred quota is produced or considered produced on the receiving farm.

1996 Act, § 155(i)(6)(D). The deferential treatment of quota lessors began as early as 1967 when quota holders were able to transfer or lease their peanut quotas and still be considered producers. See Pub. L. No. 90-211, 81 Stat. 658 (1967). This treatment ended when the 2002 Act created a new basis for awarding quotas, which specifically excluded lessors from consideration.

Plaintiffs are farm owners who had leased their peanut quotas to others who had produced peanuts during the 1998 to 2001 crop years. Although leasing of their quotas would not have affected plaintiffs' retention of their quota benefits under previous farm bills, plaintiffs now fail to meet the definition of producer under the 2002 Act and, as such, no longer are entitled to a peanut quota.

The 2002 Act places no restriction on the production of peanuts, and plaintiffs are free to produce as many peanuts as they can on their farms without penalty. Furthermore, marketing assistance is available to all peanut producers, including plaintiffs, although the marketing loan rate for non-quota peanuts is $355.00 per ton — significantly less than, for example, the $610.00 per ton and $495.00 per ton that Faye Paulk, one of the named plaintiffs, claimed to have received when she produced quota peanuts under the 1996 Act. See Paulk Aff. ¶ 16. Plaintiffs are also able to lease or transfer their farms for the production of peanuts. However, because plaintiffs no longer qualify for peanut quotas, they are unable to profit from leasing production quotas and receive lower loan rates if they produce peanuts themselves.

DISCUSSION

1. Jurisdiction and standard of review

The Court of Federal Claims is empowered by the Tucker Act, 28 U.S.C. § 1491(a)(1) (2000), to "render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States." Because plaintiffs allege a taking of property without compensation, a violation of the Fifth Amendment, they assert a claim under the Tucker Act.

As defendant has relied on documents beyond the pleadings, summary judgment is the proper form for defendant's dispositive motion. See RCFC 12(b). When reviewing a claim of an improper taking, summary judgment may be appropriate: "[T]hat it is a takings case does not affect the availability of summary judgment when appropriate to the circumstances." Avenal v. United States, 100 F.3d 933, 936 (Fed. Cir. 1996). "Whether or not a taking has occurred is a question of law based on factual "underpinnings." Wyatt v. United States, 271 F.3d 1090, 1096 (Fed. Cir. 2001). The primary issue is whether the 1996 Act created a protected property interest vested in a peanut quota holder that the 2002 Act eliminated improperly. This is a legal question that may be resolved on summary judgment. Plaintiffs contend that the 2002 Act rendered valueless expenditures made in reliance on their property interests in peanut quotas for the 2002 growing season. Moreover, by establishing a

program of marketing loans open to all peanut producers, these legislative changes had the effect of decreasing the per-ton price of peanuts and thereby provided inadequate compensation to plaintiffs. Plaintiffs have alleged a taking by regulation.

Defendant rejects elevation of plaintiffs' quotas to possession of a constitutionally protected property interest. According to defendant, a license is not a protected property interest. Even if the quotas held by plaintiffs were protected interests, the Government has not acted beyond its regulatory role, interfered with reasonable investment-backed expectations, or had a significant economic impact on plaintiffs; no taking without compensation in violation of the Fifth Amendment therefore has taken place.

Plaintiffs challenge the appropriateness of summary judgment because they see disputed issues of material fact-to wit, the incidents of plaintiffs' property interests and the facts that underlie the alleged regulatory taking. They counter that, because the terms of the 1996 Act vested plaintiffs with protected property interests in their peanut poundage quotas, the quotas constitute property protected by the Fifth Amendment. The 2002 Act interfered with plaintiffs' reasonable investment-backed expectations, was not reasonably necessary to achieve a substantial public purpose, and had a significant economic impact on plaintiffs.

2. Takings under the Fifth Amendment

Plaintiffs' claim is based on the Fifth Amendment, which provides, in pertinent part: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The Supreme Court has recognized that the Government may take private property by either physical invasion or regulation. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014-15 (1992); Wyatt, 271 F.3d at 1096.

Property may be regulated without giving rise to a compensable taking. Nonetheless, "if regulation goes 'too far' it will constitute a compensable taking." M & J Coal Co. v. United States, 47 F.3d 1148, 1153 (Fed. Cir. 1995). Limits are placed on the Government's regulation of private property flowing from the recognition that, if "subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappeared].'" Lucas, 505 U.S. at 1014 (citation omitted). To analyze plaintiffs' claim of regulatory taking, and determine if the regulation goes "too far," the court must make a "two-tiered" inquiry into the government act alleged to have constituted a taking." Chancellor Manor v. United States, 331 F.3d 891, 901 (Fed. Cir. 2003).

First, the court must consider "the nature of the interest allegedly taken to determine whether a compensable property interest exists." Id.; M & J Coal Co., 47 F.3d at 1154 (analyzing whether the "interest was a 'stick in the bundle of property

rights' acquired by the owner"). If plaintiffs are unable to prove that they held a protected property interest, their takings claim will fail. Wyatt, 271 F.3d at 1096 (holding that "only persons with a valid property interest at the time of the taking are entitled to compensation").

If plaintiffs succeed in meeting the first element, the court must determine whether the Government's action "constitutes a compensable taking of that interest for a public purpose." Chancellor Manor, 331 F.3d at 902; see also M & J Coal Co., 47 F.3d at 1154. In making this determination, the Supreme Court has identified three factors to be considered: "The economic, impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action." Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (citation omitted); Maritrans Inc. v. United States, 342 F.3d 1344,1349-50 (Fed. Cir. 2003) (articulating Penn Central factors as the "character of the governmental action at issue, the economic impact of the action on the claimant, and the extent to which the action has interfered with the claimant's distinct, investment-backed expectations").

3. Whether plaintiffs have protected property interests in peanut quotas

"[T]he Fifth Amendment concerns itself solely with the 'property,' *i.e.*, with the owner's relation as

such to the physical thing and not with other collateral interests which maybe incident to his ownership." United States v. General Motors Corp., 323 U.S. 373, 378 (1945). "The hallmark of a protected property interest is the right to exclude others." College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 673 (1999). The right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property," Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

A citizen does not the possess the "right to exclude" when he voluntarily enters an area subject to government control. Mitchell Anns, Inc. v. United States, 7 F.3d 212, 216 (Fed. Cir. 1993). Plaintiff in Mitchell Arms was a federally licensed firearms importer that entered into a contract to purchase and import rifles from Yugoslavia. Plaintiff previously had imported similar rifles with its valid permit during 1987 and 1988. In 1989, after plaintiff had purchased rifles to import into the United States, all import permits were suspended. When the U.S. Customs Service refused entry of the rifles for lack of a valid permit, plaintiff sued for just compensation for the suspension and subsequent revocation of the import permit.

The Federal Circuit held that the property owner in Mitchell Arms did not have a protected property interest in the import permit, reasoning:

> In revoking the permits, ATF withdrew its prior authorization for [plaintiff] to sell certain types of assault rifles in the

> United States. Otherwise, [plaintiff] retained complete control over the rifles. [Plaintiff] could have done anything it wished with the rifles, expect import them into the United States in their original configuration.

Id. at 217. Government action did not have the effect of taking plaintiff's rifles; rather, plaintiff lost only an expectation that the rifles could be marketed. This expectation was characterized as a mere "collateral interest" incident to plaintiff's property ownership (in the rifles) and is not, in and of itself, a property protected by the Fifth Amendment. Id.; see also Allied-General Nuclear Servs. v. United States, 839 F.2d 1572, 1577 (Fed. Cir. 1988) (holding that plaintiff did not have protected property right in expectation that permit for nuclear facility would be granted if plant is constructed).

Because Congress has the right to modify or terminate a federal program, the benefits of such a program do not constitute a property interest protected by the Fifth Amendment. Mitchell Arms, 7 F.3d at 216 (citing Bowen v. Public Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41 (1986), for the proposition that "enforceable rights sufficient to support a taking claim against the United States cannot arise in an area voluntarily entered into and one which, from the start, is subject to pervasive Government control").

While plaintiffs do hold protected property interests in their farm land and equipment, that protection does not extend to their marketing quotas.

In Conti v. United States, 291 F.3d 1334, 1343 (Fed. Cir. 2002), plaintiff held a swordfishing permit and contended that a ban on gillnet fishing constituted a taking. Although plaintiff held a property interest in his boats, nets, and gear, he did not hold such an interest in his permit. Affirming the denial of plaintiffs taking claim, the Federal Circuit noted that the ban on gillnet fishing affected his permit, but it had no effect on the value of plaintiff's boat, nets, and gear, as he was free to "'sell the vessel and the gear, fish in a different fishery, or put both the nets and the vessel to other uses.'" Id. at 1343 (quoting Conti v. United States, 48 Fed. Cl. 532, 537 (2001)).

Plaintiffs in the case at bar are not alleging that the Government has prevented them from growing peanuts for sale, nor has any interest in plaintiffs' farms, crops, or equipment been seized. The heart of plaintiffs' claim is that the Government infringed on their expectation of continued peanut quota support. Over many years plaintiffs have come to rely on their peanut quotas as a principal source of income and claim that, in terms of the longevity of this program, time itself has transmuted their quotas into property rights. The nature of plaintiffs' asserted property interests and the impact of the 2002 Act on them are fully developed on this record, and no attribute of them is disputed.

The quotas that plaintiffs claim as property interests are akin to the permits in Conti and Mitchell Arms. Even though the quotas are business assets that create an expectation of enhanced commercial activity, they do not come within the safe

harbor of property protected by the Fifth Amendment. The termination of plaintiffs' quotas by the Government has had no compensable effect on plaintiffs' protected property, *i.e.*, on their farms, crops, or equipment.

In support of their claims, plaintiffs array a series of decisions that have held a peanut quota to be a personal asset. See Wenzel v. Comm'r, T.C.M. (RIA) 91166 (1991) (peanut quota, although an asset, may not be depreciated for tax purposes); *In re* Williams, 136 B.R. 311 (Bankr. M.D. Ga. 1992) (holding peanut quota subject to treatment as property in debtor's bankruptcy estate); Smith v. Smith, 656 So. 2d 814 (Ala. Civ. App. 1994) (peanut quota property subject to division in divorce proceedings). While stating the well-accepted proposition that benefits conferred by federal legislation have attributes of property under tax law and maybe treated as an asset, these rulings shed no light on the issue of whether peanut quotas constitute property protected by the Fifth Amendment and do not challenge the rule that an expectation or benefit alone fails to qualify as a protected property right. See Rogers Truck Line, Inc. v. United States, 14 Cl. Ct. 108, 111-12 (1987) (concluding that plaintiffs possessed property interests in common carrier authorities, but not interests protected by Fifth Amendment, even though subsequent legislation rendered authorities valueless).

Plaintiffs concede the fundamental problem with their claimed right: "In this case, since a peanut quota is a creature of Congressional creation, the

scope and dimension of such a property interest is dictated by the terms and conditions of the legislation." Pls.' Br. filed Nov. 20, 2003, at 18. Plaintiffs go on to clarify that they "do not disagree with the proposition that Congress is authorized to enact changes which discontinue the peanut quota system." Id. Despite this concession, plaintiffs make the contradictory argument that the 1996 Act quotas "are vested rights of Plaintiffs" that "endure beyond the specific crop year and remain property of Plaintiffs." Id. at 19. Although plaintiffs recognize that Congress has the power to change or terminate the program, the essence of their argument is that, once Congress has granted a benefit, it cannot be taken away.

For the 2002 crop year, plaintiffs contend that their investments and commitments "vested" a property right in the peanut quotas. Plaintiffs cite Larionoff v. United States, 533 F.2d 1167, 1189 (D.C. Cir. 1976) (denying petition for rehearing), which held that a sailor who signed a re-enlistment contract with the Navy had vested a contractual right to an enlistment bonus. However, unlike the sailor in Larionoff, plaintiffs have failed to allege a significant financial *quid pro quo,* akin to a commitment to serve additional years in the Navy,

which would convert a Government gratuity into a right.[3]

Plaintiffs particularly object to the *ex post facto* operation of the 2002 Act. "Our Constitution expresses concern with retroactive laws through several of its provisions, including the *Ex Post Facto* and Takings Clauses." Eastern Enters. v. Apfel, 524 U.S. 498, 533 (1998) (plurality). While the Takings Clause safeguards against retroactive legislation affecting property rights, the Government's action in the instant case falls short of the concerns expressed in Eastern Enterprises. See Id. at 528-29 (discussing possibility "that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience").

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[3] To support its holding, the court in Larionoff discussed and cited Charles B. Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692 (1960): "[T]he 'key element' with respect to whether a benefit is a gratuity appears to be 'the absence of any financial cost in the acquisition of the right based upon the original statute.'" 533 F.2d at 1189 n.5.

The reliance necessary to convert a right from a gratuity "'is a financial detriment in the acquisition of the right, and not merely reliance on the right after it accrues.'" Id. (quoting Hochman). Thus, in circumstances such as plaintiffs', where the "'gratuity is given by a statute for public purposes which are not controlled by the merits of the donee's claim to the right the Court is reluctant to permit the donee to obstruct a reassessment of these purposes by the legislature.'" Id.

Plaintiff in Eastern Enterprises was an employer of coal miners that signed agreements in 1947 and 1964 to provide benefits to retired and disabled employees. In 1965 plaintiff ceased coal mining operations, but nonetheless came within a 1992 Act of Congress requiring it to contribute to a combined fund for coal miner benefits of pre-1966 employees. The Supreme Court ruled that coverage based on remote events constituted a retroactive taking. Plaintiffs in this case have not alleged severe retroactivity similar to the decades that had passed in Eastern Enterprises. Changing the benefits conferred under the 1996 Act is not a comparable situation. Moreover, the persistent congressional refinement of the peanut quota program prevents plaintiffs from claiming that they could not have anticipated changes both operating prospectively and impacting benefits under the 1996 Act that the 2002 Act displaced.

Congress, not plaintiffs, has the sole right to define the scope and existence of the program over which plaintiffs have no right of exclusion. Because their takings claim thus fails the primary factor of the two-tier analysis, proceeding to the second factor is unnecessary. See Maritrans Inc., 342 F.3d at 1351 ("First, a court must evaluate whether the claimant has established a 'property interest' for purposes of the Fifth Amendment."); Wyatt, 271 F.3d at 1097 (requiring "existence of a valid property interest" for all takings claims).

Plaintiffs have failed to establish a property interest. As a matter of judicial efficiency the court is confident that, if a property interest were deemed

present, plaintiffs would fail to meet the requisite Penn Central factors. Plaintiffs could not have held a reasonable investment-backed expectation that the quotas would continue because the peanut quotas were regulated heavily and had been subject to a litany of reductions and changes by Congress. See Concrete Pipe & Prods., Inc. v. Constr. Laborer Pension Trust Fund, 508 U.S. 602, 645 (1993) ("[T]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." (citations omitted)).

The nature of the Government's action does not rise to a level of a taking. The underlying purpose and importance of the 2002 Act manifested a legitimate public undertaking, and the asserted property interests were not taken for the Government's own use. The elimination of plaintiffs' quotas has not had the requisite economic impact on the value of plaintiffs' property rights, including their ability to produce peanuts. See Penn Central, 438 U.S. at 137 (finding no taking where plaintiff failed to demonstrate regulatory taking "denied *all* use" of pre-existing right). See Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225 (1986) (holding that "public program that adjusts the benefits and burdens of economic life to promote the common good" is not compensable taking); Maritrans, 342 F.3d at 1357-58 (reciting that "purpose of the Just Compensation Clause is not to deter the government from establishing regulations reasonably related to a publicly beneficial policy").

Defendant also seeks to dismiss plaintiffs' claim for violation of due process. Plaintiffs respond that their complaint contains only a claim for taking in violation of the Fifth Amendment and does not include an independent claim for a violation of substantive or procedural due process. Pls.' Br. filed Nov. 20, 2003, at 38. Because plaintiffs are not presenting such a claim, defendant's motion to dismiss is moot.[4]

CONCLUSION

Based on the foregoing, the court concludes that a peanut quota is not a property interest protected by the Fifth Amendment. Accordingly,

IT IS ORDERED, as follows:

1. Defendant's motion for summary judgment on plaintiffs' takings claim is granted, and the Clerk of the Court shall enter judgment for defendant.

2. Defendant's motion to dismiss plaintiffs' due process claims is denied as moot

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[4] Plaintiffs' reliance on Coleman v. Block, 562 F. Supp. 1353 (D.N.D. 1983), similarly is moot, in that the right at issue was procedural due process, rather than a taking. In Coleman plaintiffs were farmers who sought to prevent the Government from terminating funds under a federal loan program through enforcement of their Fifth Amendment right to due process. Unlike plaintiffs in the case at bar, plaintiffs in Coleman based their claims on a loan contract with the Government and were seeking notice and an opportunity to be heard, rather than claiming a taking without compensation. Id. at 1357.

insofar as plaintiffs have not alleged a substantive or procedural claim.

No costs.

/s/
Christine Odell Cook Miller
Judge

(3)

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No. 05-1225

In the Supreme Court of the United States

MEMBERS OF THE PEANUT QUOTA HOLDERS ASSOCIATION, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Congress's overhaul in 2002 of a statutory program that had previously limited the production of peanuts and made certain benefits available to peanut farmers effected a taking of petitioners' property.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 6
Conclusion 10

TABLE OF AUTHORITIES

Cases:

Bowen v. *Gilliard*, 483 U.S. 587 (1987) 8, 10
Eastern Enters. v. *Apfel*, 524 U.S. 498 (1998) 6, 7
Kelo v. *City of New London*, 125 S. Ct. 2655 (2005) ... 9, 10

Constitution and statutes:

U.S. Const. Amend . V 9
Due Process Clause 7
Just Compensation Clause 8
Coal Industry Retiree Health Benefits Act of 1992, 26 U.S.C. 9701 *et seq.* 7
Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, §§ 1301-1310, 116 Stat. 166-183 (7 U.S.C. 7951-7960 (Supp. III 2003)) 3
§ 1301(8), 116 Stat. 166 (7 U.S.C. 7951(8) (Supp. III 2003)) 10
§ 1302, 116 Stat. 167 (7 U.S.C. 7952 (Supp. III 2003)) 4, 8
§ 1309, 116 Stat. 179 (7 U.S.C. 7959 (Supp. III 2003)) 8

Statutes—Continued: Page

§ 1309(b)-(d), 116 Stat. 180 (7 U.S.C. 7959(b)-(d) (Supp. III 2003)) 3, 7

Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 888:

§ 155, 110 Stat. 922 2

§ 155(i)(6)(A), 110 Stat. 930 8

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A28) is reported at 421 F.3d 1323. The opinion of the Court of Federal Claims (Pet. App. D1-D22) is reported at 60 Fed. Cl. 524.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 2005. A petition for rehearing was denied on December 23, 2005 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on March 23, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are individuals who owned farms to which peanut marketing quotas had been allocated under the Federal Agriculture Improvement and Reform Act of 1996 (1996 FAIR Act), Pub. L. No. 104-127, § 155, 110 Stat. 922. The peanut quotas allowed producers on petitioners' farms to obtain favorable non-recourse loans for their crops. See Pet. App. A3. The peanut quota program began in 1941 and changed over time through periodic farm bills. See *id.* at A4-A11. Under the program in its original form, producers on farms to which quotas had been allocated were permitted to market specified quantities (or allotments) of peanuts. *Id.* at A5-A6. Farmers who marketed quantities of peanuts in excess of their allotments, or who marketed peanuts without having received allotments, were subject to financial penalties. *Id.* at A6. Beginning in 1967 and extending through the repeal of the quota program in 2002, the applicable federal statutes allowed peanut farmers to sell or lease their quotas. See *id.* at A7-A11.

"The price support for peanut producers under the 1996 FAIR Act took the form of marketing assistance loans" provided by the United States Department of Agriculture (USDA). Pet. App. A10. Under the terms of the program, "if the revenue from the sale of the peanuts did not cover the full amount of the loan, * * * the USDA made up the difference," while "[i]f the revenue from the sale of the peanut crop covered the loan amount, the producer repaid the loan in full." *Ibid.* The amount of the loan thus effectively functioned as a minimum price for the producer's peanut crop. See *ibid.* Because the loan rate for "quota peanuts" was $610 per ton, while the rate for "non-quota peanuts" was $132 per

ton, quota holders received "a considerable financial advantage in the peanut market." *Ibid.* "The 1996 FAIR Act specifically allowed quota holders to sell or lease their quotas to other producers with a farm in the same state," *ibid.*, and it further provided that such a transfer "shall not result in any reduction in the farm poundage quota for the transferring farm if the transferred quota is produced or considered produced on the receiving farm," *id.* at A11.

In 2002, Congress abolished the peanut marketing quota program, established a new program of benefits for peanut producers, and provided for a "buyout" for owners of farms with quotas under prior law. See Farm Security and Rural Investment Act of 2002 (2002 Act), Pub. L. No. 107-171, §§ 1301-1310, 116 Stat. 166-183, 7 U.S.C. 7951-7960 (Supp. III 2003). The 2002 Act's "buyout" provision authorized a one-time payment to "quota holders" (owners of quota farms) of $0.55 per pound. 2002 Act § 1309(b)-(d), 116 Stat. 180 (7 U.S.C. 7959(b)-(d) (Supp. III 2003)). Under the 2002 Act, any producer may "now grow and market unlimited quantities of peanuts without penalty or restriction." Pet. App. D6.

As a result of the 2002 Act, persons who owned farms to which quotas had previously been allocated lost the benefits associated with the former price-support program. The 2002 Act provides, however, for new program benefits. "Rather than grant the new price support program to the same individuals who held quotas under the prior program, Congress crafted a new basis for the price supports that included only those who produced peanuts during the four years before enactment of the 2002 Act." Pet. App. D6-D7. Those who engaged in the production of peanuts during the period 1998-

2001, including lessees of quotas on farms with quotas, were provided a "base" in pounds derived from their 1998-2001 production history. See 7 U.S.C. 7952 (Supp. III 2003); Pet. App. D6-D7. A direct payment (DP) and a countercylical payment (CCP) are calculated on the basis of that poundage base. See *ibid.*

Because petitioners did not produce peanuts during the relevant period, they were not allocated a "base" under the 2002 Act and therefore are ineligible for the DP and CCP payments. By contrast, the lessees to whom petitioners had leased their quotas between 1998-2001 and who had produced peanuts during that period were allocated a base, calculated by reference to their actual peanut production.

2. Petitioners filed suit in the Court of Federal Claims (CFC), alleging that the 2002 Act, by eliminating or reducing the benefits to which they had previously been entitled as quota holders, had effected a taking of their property. The CFC granted the government's motion for summary judgment. Pet. App. D1-D22. While acknowledging that petitioners "do hold protected property interests in their farm land and equipment," *id.* at D14, the court found that the peanut quotas held by petitioners under the prior legal regime did not constitute property interests, *id.* at D15-D16. The CFC further held that, even if the former quotas were determined to be property interests, petitioners still could not establish a taking. *Id.* at D19-D20. The court explained that petitioners "could not have held a reasonable investment-backed expectation that the quotas would continue because the peanut quotas were regulated heavily and had been subject to a litany of reductions and changes by Congress." *Id.* at D20.

3. The court of appeals affirmed. Pet. App. A1-A28.

a. The court of appeals held that petitioners had "established a property interest cognizable under the Fifth Amendment" in the quotas allotted to them under the 1996 FAIR Act. Pet. App. A24; see *id.* at A18-A24. The court based that conclusion on the facts that the quotas were transferable (subject to certain statutory restrictions) under the terms of the prior law, see *id.* at A18-A22, and that each quota holder was given the right to market a specified quantity of peanuts and to receive a guaranteed minimum price for his crop, see *id.* at A22-A24.

b. The court of appeals further held that, although peanut quotas under the 1996 FAIR Act "ha[d] aspects of property," the government was not required to compensate petitioners when changes in the legal regime "render[ed] the quotas less valuable, or even valueless." Pet. App. A24; *id.* at A24-A28. The court explained:

> Peanut quotas are property, but they are a form of property that is subject to alteration or elimination by changes in the government program that gave them value. The peanut quota granted under the 1996 FAIR Act was a privilege extended by Congress to support farmers during times of market stress as a general policy to attenuate and smooth out the fluctuations of the market place. Thus, the holders of peanut quotas, like the holders of food stamps, have no legally protected right against the government's making changes in the underlying program and no right to compensation for the loss in value resulting from the changes.

Id. at A25.

The 1996 FAIR Act specifically provided that the provisions governing the peanut-quota program "shall

be effective only for the 1996 through 2002 crops of peanuts." Pet. App. A27. Relying on that provision, petitioners contended that "the 2002 Act effectuated a taking by impermissibly applying retroactively to the 2002 crop of peanuts for which price supports had already been established under the 1996 Act." *Ibid.* The court of appeals rejected that contention, holding that "[t]he inclusion of a sunset provision does not operate to transform a regulatory scheme for the distribution of subsidies into a compensable property interest under the Fifth Amendment." *Ibid.* "Rather," the court explained, "the sunset provision highlights Congress's intention that the price support provisions be temporary in nature." *Ibid.*

ARGUMENT

The judgment of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioners contend (Pet. 8-14) that the court of appeals' ruling is inconsistent with this Court's decision in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998). Petitioners' argument is premised on the fact that, under the 2002 Act, petitioners' earlier decision to lease their peanut quotas rather than to produce peanuts during the years 1998-2001 renders them ineligible to receive certain benefits (the DP and CCP) that are currently available to the quota lessees. Petitioners contend (Pet. 10) that "the sudden and complete loss of price supports" subjects them to a form of retroactive "liability" for which they are entitled to just compensation.

Petitioners' reliance on *Eastern Enterprises* is misplaced. The plaintiff in *Eastern Enterprises* was re-

quired by the Coal Industry Retiree Health Benefits Act of 1992 (Coal Act), 26 U.S.C. 9701 *et seq.* to make monetary payments totaling an estimated $50-$100 million, based on its employment of certain retired miners before 1966. See 524 U.S. at 517, 529 (plurality opinion). A four-Justice plurality concluded that the Coal Act effected an uncompensated (and therefore unconstitutional) taking of the plaintiff's property because the Act "impose[d] severe retroactive *liability* on a limited class of parties that could not have anticipated the liability, and the extent of that liability [was] substantially disproportionate to the parties' experience." *Id.* at 528-529 (emphasis added); see *id.* at 529-537. Justice Kennedy disagreed with the plurality's application of takings principles. *Id.* at 539-547 (Kennedy, J., concurring in the judgment and dissenting in part). Justice Kennedy concluded, however, that the Coal Act violated the Due Process Clause because it was inconsistent with "our settled tradition against retroactive laws of great severity." *Id.* at 549; see *id.* at 547-550.

Unlike the plaintiff in *Eastern Enterprises*, petitioners do not challenge a "severe retroactive liability," or indeed a liability of any kind. Rather, petitioners' complaint is that they are ineligible to receive certain federal *benefits* (the DP and CCP) under the 2002 Act as a result of conduct (*i.e.*, their decision to lease their peanut quotas during crop years 1998-2001 rather than produce peanuts themselves) in which they engaged before the 2002 Act was enacted.[1] Petitioners identify no deci-

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[1] Although petitioners are not eligible for the DP or the CCP, they were entitled under the 2002 Act to a one-time buyout of $.55 per pound ($1100 per ton), see 2002 Act § 1309(b)-(d), 116 Stat. 180 (7 U.S.C. 7959(b)-(d) (Supp. III 2003)), nearly twice the amount of the support level ($610 per ton, see Pet. App. A10-A11) available to quota holders

sion of this Court or any other court suggesting that the Just Compensation Clause is implicated when continued entitlement to a government *subsidy* is made contingent on a potential recipient's prior conduct. Cf. *Bowen* v. *Gilliard*, 483 U.S. 587, 604-605 (1987) (explaining that, for purposes of takings analysis, Congress's decision to reduce the level of public-assistance benefits under an existing program raises no greater concern than would Congress's enactment of a new benefit program incorporating equivalent limitations).

Petitioners rely in part on a provision of the 1996 FAIR Act that stated that a quota holder's lease of his "farm poundage quota" would not "result in any reduction in the farm poundage quota for the transferring farm." Pet. 6 (quoting 1996 FAIR Act, § 155(i)(6)(A), 110 Stat. 930); see Pet. 11-12 (discussing similar provisions of prior law). That provision, however, simply stated a rule of law that applied for as long as the FAIR Act remained in effect; it did not purport to guarantee that the law would remain unchanged. See Pet. App. A26 ("Since Congress at all times retains the ability to amend statutes, a power which inheres in its authority to legislate, Congress at all times retains the right to revoke legislatively created entitlements."). Even under the 2002 Act, moreover, petitioners' prior lease arrangements did not have the effect of reducing their future "quotas." Because the 2002 Act eliminated the prior peanut quota system, see 7 U.S.C. 7959 (Supp. III 2003), petitioners (like all other peanut farmers) are currently free to produce and market *unlimited* quantities of peanuts without financial penalty. Because petitioners did not produce peanuts during crop years 1998-2001, they

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under the prior legal regime.

are not eligible for the DP and CCP under the 2002 Act. Petitioners offer no basis, however, for characterizing their ineligibility for those benefits as a reduction in their "quotas."

2. Petitioners contend (Pet. 15-20) that the court of appeals' ruling conflicts with this Court's decision in *Kelo* v. *City of New London*, 125 S. Ct. 2655 (2005). Petitioners do not rely on the Court's *holding* in *Kelo*, which sustained the challenged taking against a Fifth Amendment challenge. See *id.* at 2668. Rather, petitioners invoke the Court's reiteration of the established principle that "the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation." *Id.* at 2661; see Pet. 16. Petitioners' reliance on *Kelo* is misplaced.

To begin with, the Court in *Kelo* addressed an issue quite distinct from the one presented here. The question in *Kelo* was whether an *acknowledged* taking—a local government's exercise of the power of eminent domain—would be unconstitutional despite the government's willingness to pay just compensation. See 125 S. Ct. at 2658. The question in the instant case, by contrast, is whether Congress's modification of the peanut subsidy program effects a compensable taking to begin with. The decision in *Kelo* sheds no meaningful light on that issue.

In any event, the 2002 Act did not "take the property of *A* for the sole purpose of transferring it to another private party *B*." *Kelo*, 125 S. Ct. at 2661. Rather, Congress simply abolished one subsidy program in its entirety and established another in which petitioners are free to participate. In allocating benefits under the new program, Congress determined that eligibility for the

DP and CCP should be restricted to persons who had "share[d] in the risk of producing a crop on a farm" during crop years 1998-2001. 2002 Act § 1301(8), 116 Stat. 166-167 (7 U.S.C. 7951(8) (Supp. III 2003)); see Pet. App. D7. But the fact that the benefits available to former quota lessors are less generous under the new program than under the prior legal regime, while those available to former lessees are more generous, does not mean that a transfer of property has occurred. Cf. *Gilliard*, 483 U.S. at 604 (Congress does not effect a taking when it alters an existing benefit program "to distribute limited resources more fairly"). Nor do the DP and CCP eligibility criteria established by the 2002 Act "raise a suspicion that a private purpose was afoot." *Kelo*, 125 S. Ct. at 2667. It was manifestly reasonable for Congress, in fashioning the new peanut subsidy program, to make certain benefits available only to persons who had produced peanuts during the most recent crop years.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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